

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

January 13, 2006

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

Regarding: Waive the Timeliness of Written Requests For a Contested Case Hearing
Appointment and Selection of a Hearing Officer to Conduct All Hearings
for One (1) Contested Case Hearing

Subject Petitions: Docket No. **HA-06-01**

In the matter of a Contested Case request to deny Conservation District Use Application (CDUA) HA-3250 for the Commercial Use of Hand Quarried Volcanic Ash Located at Pu'u Nene, Kaohe, North Hilo, Island of Hawaii, TMK: (3) 3-8-001:001 owned by the State of Hawaii.

Background

On November 7, 2005, and November 17, 2005, the Department received two petitions for a Contested Case from Keoni Choy and David Paul to deny Jack Lockwood's CDUA HA-3250 for the Commercial Use of Hand Quarried Volcanic Ash Located at Pu'u Nene, Kaohe, North Hilo, Island of Hawaii, TMK: (3) 3-8-001:001 owned by the State of Hawaii (**Exhibit 1 and 2**).

Authority for Designating Hearing Officers

Hawaii Administrative Rules (HAR) §13-1-32 (d) provides that the BLNR may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR §13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board."

Additionally, Hawaii Revised Statutes Sections 92-16 and 171-6 also provide that the Board may delegate to the Chairperson the authority to select the hearing officer to conduct a Contested Case Hearing.

Basis for Designating Hearings Officers

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

Discussion:

Staff notes HAR, §13-1-31 (3) notes, "all persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application."

Staff notes two oral requests to contest the CDUA was made at the public hearing of October 25, 2005. However, written petitions were not received in a timely manner. One petition was received on Monday, November 7, 2005, thirteen days after the public hearing and the other was received on Thursday, November 17, 2005, twenty-three days after the public hearing. Pursuant to HAR, §13-1-29 Request for hearing, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the board not later than ten days after the close of the public hearing. The time for making an oral or written request and submitting a written petition may be waived by the board.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. The determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing should also be conducted by the Hearing Officer rather, than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Staff therefore recommends,

Recommendation:

- 1) That the Board authorize the appointment of a Hearing Officer for CC HA-06-01, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested case Hearing, and

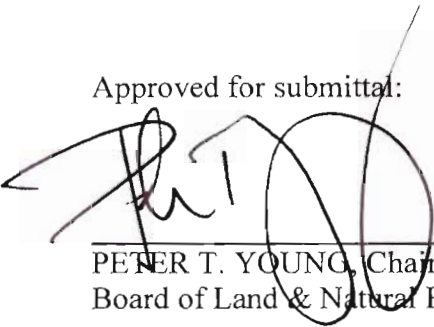
- 2) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson;
- 3) That the Board waive the petitioners' failure to make a written request in a timely manner because an oral request was made at the public hearing which was subsequently followed by a written request.

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



PETER T. YOUNG, Chairperson
Board of Land & Natural Resources

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. Name David Paul Phone _____ Fax _____
2. Address P.O. Box 2081, Kea'au, HI. 96749
Email Address WaikahakahaFarm@msn.com
3. Attorney (if any) _____ Phone _____ Fax _____
4. Address _____
Email Address _____
5. Subject Matter: Hand Quarrying of Volcanic Ash at Pu'u Nene
6. Date of Public Hearing/Board Meeting Oct. 25, 2005 5pm
7. Legal authority under which hearing, proceeding or action is being made
HRS 343
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: TMK (3)3-8-01:01 (part) Pu'u Nene.
State of Hawaii, Conservation District Use Laws.
9. The specific disagreement, denial or grievance with the above matter: The consultant failed to conduct proper Biological Studies of Pu'u Nene. He has no data to back up his "no impact" findings.
10. Outline of specific issues to be raised: A proper Environmental Assessment of Pu'u Nene has not been done. The project intends to dismantle a portion of a Conservation District and sell it.
11. Outline of basic facts: The DLNR is charged with the task of protecting Conservation Lands including protection from the actions and intents of researchers.
12. The relief or remedy to which you seek or deem yourself entitled: Preservation, Management and Recovery of a Conservation District (Pu'u Nene)
over →

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: Nov. 3, 2005

2.) cont. → Conservation Districts are here
in ~~trust~~ for the "public good".

- Digging up materials from
Pūu doesn't benefit the people of
Hawai'i, and it should not be let
to waste for money.

If the State of Hawai'i, DLNR
tends to make money from Pūu/
then they should invest that money
back into the area affected, (Pūu)
restoration of rare conservation sites
for the good of the people!

Opening Conservation Districts to commercial
activities is against the good of the
people! ~~Deny~~ the Permit!

Sincerely, David Paul
David Paul

HA-06-01

BOARD OF LAND AND NATURAL RESOURCES
PETITION FOR A CONTESTED CASE HEARING

RECEIVED
OFFICE OF CONSERVATION
NOV -7 A 9:34

1. Name Keoni Choy Phone _____
2. Address P.O. Box 1094 Ola'a, (Kurtistown) Hawai'i, Hawai'i. (96760)
Email konohiki1@webtv.net
3. Attorney (if any) _____ Phone _____ Fax _____
4. Address _____
Email Address _____
5. Subject Matter: Hand Quarrying of Volcanic Ash at Pu'u Nene
6. Date of Public Hearing/Board Meeting October 25, 2005
7. Legal authority under which hearing, proceeding or action is being made HRS
8. Nature of your specific legal interest in and above matter, including tax map key of property affected: TMK (3)3-8-01-01 (por.) "PU'U 'OMAOKOILI" from-MAP OF THE ISLAND OF HAWAII, Hawaii Territorial Survey December-1928. Constitutional and statute interest as a Beneficiary of the Hawaiian trust. Active user of the resources of the proposed project area.
9. The specific disagreement, denial or grievance with the above matter: It is my contention that this application lacks at least one of the Fundamental Elements required for the use of this property. The requested use reduces the corpus of the trust without an order from the probate court. State of Hawaii is not following its own laws that requires the preparation of an EIS triggered by: 1 use of State or Hawaii county lands or funds & 2 use in a Conservation District. The removal of soil from Hawaii.
10. Outline of specific issues to be raised: Any reduction of the corpus of the trust requires the permission of the probate court. I have not at any time received notice from the probate court, DLNR, the Applicant or any other entity or person promoting this use, that my rights as a beneficiary of the Hawaiian Trust will be affected by an order from the probate court, absent of this notice & without that order, State of Hawaii, DLNR does not have jurisdiction to consider this application for this use. Besides being a beneficiary of this trust, I am also an active user of the resources of this Pu'u and all surrounding areas. This includes all lands positively identified as trust land, and in all of those areas, I hold constitutional and statutory interest.
11. Outline of basic facts: This Pu'u has been damaged by prior excavations and this damage has diminished my potential for use of this property. The property identified for this use is part of the Corpus of the Hawaiian Land Trust (portions of which are known as ceded land trust). The land is in the Hawaiian Archipelago.
12. The relief or remedy to which you seek or deem yourself entitled: Reject the Permit for lack of Jurisdiction to grant this use without probate court permission. Preserve the Pu'u for future generations. Fence and manage this landmark [Pu'u Omaokoili (Pu'u Nene)].

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: Nov. 03 2005

EXHIBIT 2

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

January 13, 2006

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

REGARDING: Conservation District Enforcement File HA 05-19
Regarding Construction of a Single Family Residence Not
in Accordance of Approved Construction Plans

Mitigative Measures to Reduce Impact to the Natural
Resources

LANDOWNERS: A. David and Mary Carroll

TMK's: (3) 9-5-016:036

AREA OF USE: 17,692 square feet

AREA OF PARCEL: 47.5 acres

LOCATION: Hokukano, Ka'u, Island of Hawaii

SUBZONE: General

SUMMARY BRIEF:

Enforcement File HA 05-19 was deferred during the Board of Land and Natural Resources (Board) meeting of September 23, 2005. The purpose of the deferral was to review the records of the Board meeting of February 23, 2001 regarding the approval of Conservation District Use Permit (CDUP) HA-3002 for the construction of a single family residence and to seek Attorney General (AG) advice to explore actions the Board could take regarding the applicant's failure to construct the residence to approved plans.

The AG has indicated that the Board has the powers to:

- Revoke the permit for failure to comply with all permit conditions;
- Require the landowner to build accordingly to original approved plans;
- Require the landowner to submit plans to connect the two separate structures.

The original permit approval stressed that there would be no separate south wing with a bar sink feature. The Bar sink feature was removed and the siting of the home was reconfigured. The Department reviewed and approved plans. However, approved plans that connected the two existing separate structures were not adhered to.

The site inspection of December 7, 2004 revealed that the 2 story separate wing consisted of a bedroom and bathroom on the first level and a room being used as an office upstairs. Because there are no kitchen facilities and the property is located in a remote area, this living area is less likely to be used as a commercial rental. In addition, Condition # 4 of CDUP HA-3002 prohibits the dwelling to be used for rental or commercial purposes.

Although the Board does have the authority to revoke the permit, Staff does not believe that this would be an equitable action, since the violations are curable. The overall design of the existing structure is built accordingly to approved plans. Staff continues to support the original recommendations of this enforcement file.

DESCRIPTION OF AREA:

The subject 47.5-acre oceanfront property is located on the island of Hawaii in the Ka'u district, two miles north of Whittington Beach Park and lies within the General and Resource subzone of the Conservation District. State of Hawaii land lies to the south, to the east with the Hawaii Belt Highway beyond, and to the west via the ala loa or government trail makai of the subject area. There is a private landowner to the north and the parcel continues to the west with the Pacific Ocean beyond (**Exhibits 1, 2 & 3**).

A Single Family Residence and associated improvements exists on the subject parcel. The Board of Land and Natural Resources (BLNR) approved Conservation District Use Application (CDUA) HA-3002 for the construction of the Single Family Residence (SFR) and associated improvements on February 23, 2001 subject to twenty-three conditions (**Exhibit 4**). Access, electrical and telephone services are provided off of Hawaii Belt Road. Water is from a private water catchment system or is trucked in. Sewerage is through an Individual Wastewater System.

ALLEGED UNAUTHORIZED LAND USES:

In the Summer of 2004, the Office of Conservation and Coastal Lands (OCCL) received various complaints regarding the construction of the SFR. On July 16, 2004, OCCL Staff conducted a cursory site visit. The SFR did not appear to be built in accordance with the approved construction plans on file with the Department (**Exhibit 5**).

On December 7, 2004, Staff conducted another site inspection and noted the following: An unpermitted structure appears to exist in the northeast corner of the property (**Exhibit 6**); Construction of the SFR did not appear to be in accordance with construction plans on file with the Department (**Exhibit 7 & 8**); The structure appeared to resemble two living units and an entry way had been constructed without approval (**Exhibit 9**).

The property owners Counsel, Mr. Steven Lim, was notified of this by correspondence dated December 29, 2004. In addition, Mr. Lim was also notified that the OCCL had no record that the permit approval had been placed in recordable form as a part of the deed instrument of the legal lot of record (condition # 5) and that the Department was requesting input from the U.S. Fish and Wildlife and the State of Hawaii Division of Aquatic Resources whether lights emanating from the residence could impact wild life and the OCCL may seek additional conditions from the Board of Land and Natural Resources to mitigate visual impacts resulting from the development such as repainting and landscaping **(Exhibit 10)**.

By correspondence dated February 4, 2005, Mr. Lim responded to the noted concerns:

"The unpermitted structure at the northeast corner of the property is a temporary storage building that is being utilized during the construction of the SFR. At the conclusion of the construction, this structure will be dismantled and removed from the property;"

"The Carroll's are currently working with OCCL to process the "as-built" plans for the entryway feature;"

Regarding the visual impacts:

"The exterior wall finish is a synthetic stucco known as dryvit, and has an elastomeric finish with an integral color. The tan shade "natural white" exterior color was selected by the Carrolls their preferred proposed lighter white in keeping with the earth tones compatibility provision. The cost of installing the dryvit wall was costly but requires minimal future maintenance, is not suitable for repainting, and is durable against sea sprays." **(Exhibit 11)**

In addition, a copy of the recordation of permit conditions with the deed was submitted. Furthermore, correspondence from the Architect states the unpemitted structure (Sears shed) in the northeast corner has been removed **(Exhibit 12)**. Because condition # 5 regarding deed recordation has been complied with and the unpermitted structure has been removed, Staff believes these two issues have been resolved. Therefore the specific Conservation District violations, which are the subject of this submittal are: 1) Not building in accordance with approved construction plans; and 2) Unapproved construction of an entryway, courtyard and stonewalls.

REFERRAL OF ALLEGED VIOLATIONS TO THE LAND BOARD RATHER THAN THE HEARING OFFICER/ADMINISTRATIVE PENALTY SYSTEM (HOAPS):

A decision was made to refer the subject alleged violations to the Board of Land and Natural Resources rather than HOAPS because the violations are alleged in a single report. HOAPS draws a distinction between Level I and Level II violations. Level I violations are of the more serious category and must be referred to the Board of Land and Natural Resources, while Level II violations may be processed through HOAPS. HOAPS includes criteria for determining Level I and Level II violations. In this case, the subject

alleged violations rise to Level I because of noncompliance with Board imposed conditions.

In addition, pursuant to CDUP HA-3002 condition # 13 that states, "Where any interference, nuisance, or harm maybe caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate these interference, nuisance, harm, or hazard." Mitigative measures are also proposed in this report to the Board for consideration to lessen the impacts of the development on scenic and natural resources.

RESOLUTION OF UNAUTHORIZED LAND USES:

Conservation District

Chapter 13-5, Hawaii Administrative Rules (HAR) and chapter 183C, Hawaii Revised Statutes (HRS), regulate land uses in the Conservation District by identifying uses that may be allowed by Conservation District Use Permit. The chapters also provide for penalties, collection of administrative costs and damages to state land for uses that are not allowed or for which no permit has been obtained. Chapter 13-5, HAR defines "land use" in part as: (1) The placement or erection of any solid material on the land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs; (2) The grading, removing, harvesting, dredging, mining or extraction of any material or natural resource on land of any material or natural resource on land; (3) The subdivision of land; or (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

Not building in accordance with approved construction plans and unapproved construction of an entryway, courtyard and stonewalls, are separate land uses that occurred in the conservation district without approval, and therefore allegedly violate the above chapters. This report and staff recommended conditions seek to resolve the two subject conservation district violations. Pursuant to Chapter 183C, HRS, the maximum fine for a conservation district violation is \$2,000.00 per violation, or \$2,000.00 per day.

DISCUSSION

The Permittee appears to be noncompliant in three areas:

- 1) The Department did not approve plans for a courtyard. Photos taken during the cursory site visit of July 16, 2004 illustrates that the rockwalls and entryway of the courtyard were constructed prior to plan approval (**Exhibit 13**).

Thus, the Permittee violated condition # 6 that states, "Before proceeding with any work authorized by the department or the board, the applicant shall submit four copies of the construction plans and specifications to the chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the applicant. Plan approval by the chairperson does not constitute approval required from other agencies;"

- 2) Condition # 19 specifically states, "The single family residence shall not contain any "South wing or separate, but connected living area" or any other similar design."

On July 6, 22001, the Land Division issued a letter approving the preliminary construction plans for the Carroll residence (**Exhibit 14**). The letter noted "While the structure does appear to consist of somewhat separated living units, this design will be considered sufficiently integrated to receive preliminary approval of the design." In addition, the Carrolls were asked to delete a wet-bar and sink from the plan. The preliminary design contained a spiral staircase that appeared to "integrate" the structures. Staff felt comfortable with the proposed design and felt that it would not violate condition # 19 that expressively prohibited a south wing or separate living area. On October 15, 2001, final plans were approved (**Exhibit 15, 16, 17 & 18**).

When staff began receiving complaints in the summer of 2004 that two (2) residences had been constructed on the property an investigation was initiated. Staff visited the site on two occasions. Photographs were taken during these site visits (See Exhibits 7 & 8). The photographs clearly provide evidence that the residence was not constructed in accordance with approved plans and in violation of condition 19. The photographs give the appearance of two separate structures. Based on this site visit, staff requested "as built plans" (**Exhibit 19**). These plans were provided and differ from the approved plans.

- 3) Pursuant to Chapter 13-5, Exhibit 4, Single Family Residential Standards, Compatibility Provisions, A SFR must be compatible with the surrounding environs.

The light colored hue of the SFR is not compatible with the surrounding locality. The SFR appears to stand out due to the contrast of the dark lava fields with the white synthetic stucco exterior.

OCCL Actions

The Department has received significant complaints regarding the construction of this residence. Because certain members of the community asked that the permit be revoked, Staff conducted a thorough review of the events surrounding the processing of the original CDUA as well as actions taken by the landowner since the permit was approved to ensure that there have been no major anomalies in this case.

Staff consulted with the State Historic Preservation Division in regards to the archaeological cultural resources. The Division of Aquatic Resources and the National Marine Fisheries Service were also consulted in regards to the potential impact to sea turtles. Staff attended a public meeting at Na'alehu on December 7, 2004 to listen and to hear community residents concerns.

Staff has concluded, based on the record that proper procedures were followed during the processing of the application: A site inspection was conducted on July 19, 2000 by Historic Preservation Staff (**Exhibit 20**); Two copies of the application and the Draft Environmental Assessment were sent to Naalehu Public Library (**Exhibit 21**); In

response to a petition signed by 155 residents, the landowner's Counsel held two public meetings. One at 1 pm on Sunday, November 12, 2000 on site and the other at 6:30 pm at the Naalehu Community Center on November 14, 2000 (**Exhibit 22 & 23**); The Final Environmental Assessment was sent to the Office of Environmental Quality Control for publication and the Pahala School and Public Library and to the Na'alehu Public Library (**Exhibit 24, 25, & 26**).

Staff further notes the Staff report generated for CDUA HA-3002, signed by the former Chairperson and reviewed by the Board of Land and Natural Resources disclosed past unauthorized actions, land uses, the petition signed by 155 Ka'u residents opposing the development, desecration of burials, historical and archeological sites and the potential precedent setting nature of siting a residence on a rugged, rural open space landscape (**Exhibit 27**). The Land Board was fully informed of the issues surrounding the application. On February 23, 2001, the Board of Land and Natural Resources approved CDUA HA-3002 for a Single Family Residence subject to 23 conditions.

Potential Impact To Turtles

Staff notes this is the first SFR in the subject area. Daily human activity impacts have not been examined or quantified in the past. However, this area is noted for a number of small rocky beaches where the critically-endangered Hawksbill sea turtle is known to nest. Beachfront lighting from coastal development may impact both nesting females and hatchling turtles. Coastal residents and visitors must prevent all lights from illuminating and being visible from the beach including security lights, balcony and porch lights, landscaping and decorative lights, flashlights and car headlights.

Upon review of photos and blueprints of the SFR with large ocean-facing windows and outdoor lanai areas, the Division of Aquatic Resources (DAR), provides the following comment, "It is our opinion that the existing structure as described would have the potential to cause negative impacts on nesting sea turtles and their hatchlings." In addition, the following mitigation recommendations are given: Erect an artificial light screen; Plant a vegetation buffer; Reorient outside lighting utilizing hoods and shields; Refit outdoor light fixtures; Utilize window coverings such as blinds or curtains; Window tinting; and Behavior modification (**Exhibit 28 & 29**).

Environmental Compatibility

The open rugged lava coastlines of Ka'u are a scenic resource. Pursuant to the Hawaii Administrative Rules Chapter 13-5, Exhibit 4 Single Family Residential Standards, Compatibility Provisions, the SFR shall be compatible with the surrounding environs through landscaping to screen structures or the color of the surface of the structure and roof should be earth tones, or compatible with surrounding areas. Regarding the compatibility of the SFR to the surrounding environs, Staff notes, the contrast of the house color against the former lava flows are intrusive to the surrounding area (**Exhibit 30 & 31**). The applicant's Counsel has stated the SFR is not suitable for painting. However, a much darker hue would mitigate the contrast significantly. The elements of the sun, wind and particulate matter of the area will weather the structure, however, it

will most likely not be to a degree to lessen the impact of the scenic resource. Landscaping could decrease the impact on view plains. However, in correspondence with the Architect (see Exhibit 12), it has been stated that, "Even plants indigenous to the area have proven to be very difficult to grow. Only the native species can survive the harsh environment and persistent winds." Therefore Staff believes that landscaping may not be the appropriate response.

Cultural Resources

The Historic Preservation Division (HPD) was consulted and based upon an October 13, 2004 site inspection HPD has determined that "There are archaeological features in close proximity to the SFR both on their property and on the adjacent State property. These features have never been formally recorded." In conclusion, HPD states "It remains unclear if there is oral testimony within the Ka'u Community or information within the historical record that would specifically identify the sites as burials. Archaeological testing of features in close proximity (on the a'a flow) to the project area may support the original interpretation of the site as a cemetery." **(Exhibit 32)** When OCCL Staff visited the site on December 7, 2004, burials were pointed out on adjacent sides of the SFR.

Prior Violation

On July 12, 1977, the County of Hawaii notified the former landowner of a complaint received regarding construction of roadways, **grading**, construction of a reservoir, historic site destruction and blocking of the government beach trail with boulders. In addition, the County informed the former landowner that the land was within the Conservation District and that a Special Management Area (SMA) permit was required **(Exhibit 33)**. The former landowner applied for a Special Management Area (SMA) permit in December of 1977 and submitted a Conservation District Use Application (HA-1065) in June of 1978 for a Single Family Dwelling and Stock Grazing Use.

However, the Board denied CDUA HA-1065 without prejudice on November 22, 1978 because an SMA clearance was not received prior to the Board meeting **(Exhibit 34)**. CDUA HA-3002 for the existing SFR discusses this former application and states, "Staff was of the opinion that the Board's action of November 22, 1978 resolved violations on the parcel. Staff understands that it was the Board's intention in 1978 to only require restoration of the land if SMA permit or clearance **could not** be obtained." On November 29, 1978, the former landowner did receive an SMA from the County of Hawaii. However, two months later the former landowner passed away in January of 1979.

As mentioned, the former landowner graded the area back in the '70's. Regarding the application for the existing SFR, the Historic Preservation Division's determination (See Exhibit 20) states "We believe a house could be constructed on the existing house pad on the condition that there is no additional grading work conducted off the existing pad and access road. If your client agrees to the above condition, then the proposed action will have "no effect" on significant historic sites. In the future, if the parcel is developed, an archaeological inventory survey would be requested by our office prior to any permit

approvals." There is no evidence that the current landowners have graded beyond what was previously graded in 1977. Staff has spoken to community members and has reviewed documentation that strongly suggests the existing house site that was previously graded by the former landowner in 1977 is the site of the current SFR. It does not appear that additional grading took place.

Furthermore, with the passing of the former landowner, the surviving landowner did not complete the process of the land exchange with the State of Hawaii that was executed on December 8, 1975. The approved land exchange was for public purpose to provide a safer access to the subject property. The State acquired the former access road in exchange the former landowner acquired the existing access road (**Exhibit 35**).

However, the subdivision/consolidation in the Conservation District was never approved as reflected in property tax maps and County of Hawaii records (**Exhibit 36 & 37**). Staff recommends an After the Fact Conservation District Use Application be filed to legalize this established access subject to Board approval.

This submittal and notice of the Board's meeting will be sent to the Counsel for the subject property owners by certified mail to the address of record in Hawaii.

FINDINGS

1. That the landowner did in fact, authorize, cause or allow two separate unauthorized land uses (not building in accordance with approved construction plans and unapproved construction of an entryway, courtyard and stonewalls) to occur;
2. That the alleged unauthorized land uses are of a serious nature;
3. That the two unauthorized land uses occurred within the State Land Use Conservation District, General subzone;

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to Chapter 183C, Hawaii Revised Statutes (HRS), the Board find the landowner in violation of Chapter 183C and Chapter 13-5, Hawaii Administrative Rules (HAR), and is subject to the following:

1. The landowner violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in two instances by failing to properly connect the two wings of the Single Family Residence and failing to obtain approval prior to construction of an entryway, courtyard and stonewalls. The alleged is fined a total of \$4,000.00 for two Conservation District violations.

2. The landowner is fined an additional \$1,200.00 for administrative costs associated with the subject violations;
3. The landowner shall pay all fines (total \$5,200.00) within ninety (90) days of the date of the Board's action;
4. The landowner shall submit construction plans to the Office of Conservation of Coastal Lands, in accordance with Chapter 13-5 HAR, Exhibit 4, to properly attach the two separate structures within 120 days of the Board's action;
5. Upon approval, the landowner shall complete construction in accordance with the approved plans within one year of the plans approval;

Regarding mitigative action to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;

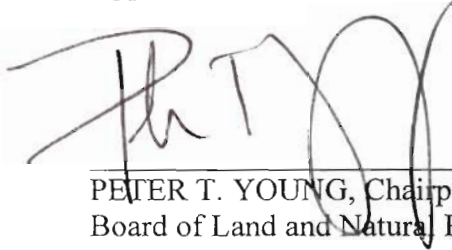
6. The landowner shall submit to the Office of Conservation and Coastal Lands potential shades and hues of brown, gray, or green for painting of the Single Family Residence to blend in with the surrounding environment within 90 days of the Board's action;
7. Upon approval, the landowner shall paint the Single Family Residence within 90 days of approval;
8. The landowner shall submit to the Office of Conservation and Coastal Lands a residential light screening and mitigation plan within 90 days of the Board's action;
9. Upon approval, the landowner shall implement the residential light screening and mitigation plan within 90 days of approval;
10. There shall be no outside lighting on the north and east sides of the SFR;
11. That an After the Fact Conservation District Use Application be filed for the subdivision/consolidation for the land exchange of December 8, 1975 with the State of Hawaii;
12. That in the event of failure of the alleged to comply with any order herein, the landowner shall be fined an additional \$2,000.00 per day until the order is complied with; and
13. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "K. Tiger Mills", written in a cursive style.

K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:

A handwritten signature in dark ink, appearing to read "Peter T. Young", written in a cursive style.

PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

A map of the state of Hawaii, showing the outlines of the islands and the boundaries of the counties. The counties labeled are: Niihau, Kauai, Oahu, Maui, Hawaii, and the Line Islands (Kure, Midway, Laysan, etc.). Major cities and towns are marked with dots and labeled: Honolulu, Hilo, Kailua, Kaneohe, Wahiawa, etc. A circle is drawn around the area of Honolulu, labeled 'Subject area'. A compass rose is in the bottom right corner, indicating North (N), South (S), East (E), and West (W).

subject area





STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

FEB 27 2001

Ref.:PB:EAH

File No.:CDUA HA-3002B

Mary and David Carroll
603 Winsford Rd.
Bryn Mawr, PA 19010

Dear Carrolls,

Subject: Conservation District Use Application (CDUA) No. HA-3002 for the Construction of a Single Family Residence at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16:36

I am pleased to inform you that on February 23, 2001, the Board of Land and Natural Resources (Board) approved your CDUA for the construction of a single family residence at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16:36, subject to the following conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of Chapter 13-5, Hawaii Administrative Rules (HAR), including the standard conditions listed in 13-5-42, HAR;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
3. The applicant shall comply with all applicable Department of Health administrative rules;
4. The single family dwelling shall not be used for rental or any other commercial purposes;
5. The applicant shall provide documentation (e.g. book and page or document number) that this permit approval has been placed in recordable form as a part of the deed instrument of the legal lot of record, prior to submission for approval of subsequent construction plans;

EXHIBIT 4

6. Before proceeding with any work authorized by the department or the board, the applicant shall submit four copies of the construction plans and specifications to the chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the applicant. Plan approval by the chairperson does not constitute approval required from other agencies;
7. Any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and, unless otherwise authorized, shall be completed within three years of the approval of such use. The applicant shall notify the department in writing when construction activity is initiated and when it is completed;
8. All representations relative to mitigation set forth in the accepted environmental assessment or impact statement for the proposed use are incorporated as conditions of the permit;
9. The applicant understands and agrees that the permit does not convey any vested rights or exclusive privilege;
10. In issuing the permit, the department and board have relied on the information and data which the applicant has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
11. When provided or required, potable water supply and sanitation facilities shall have the approval of the department of health and the board of water supply;
12. Provisions for access, parking, drainage, fire protection, safety, signs, lighting, and changes on the landscape shall be provided;
13. Where any interference, nuisance, or harm maybe caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
14. During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
15. Cleared areas shall be revegetated within thirty days unless otherwise provided for in a plan on file with and approved by the department;

16. Use of the area shall conform with the program of appropriate soil and water conservation district or plan approved by and on file with the department, where applicable;
17. Access to the Government Beach Trail shall not be blocked;
18. If, during construction, historic sites, burials or burial remains are encountered, construction shall stop immediately, the Division of Historic Preservation notified immediately and appropriate measures approved or required by the department implemented prior to subsequent construction;
19. The single family residence shall not contain any "South wing or separate, but connected living area" or any other similar design;
20. This permit does not include approval for development of a water well. Any water well use, or any other use outside of the access road and residence construction sites shall require an amendment to this permit;
21. Other terms and conditions as prescribed by the chairperson;
22. Failure to comply with any of these conditions shall render this permit void; and
23. Access will not be denied for people accessing the property who are involved in traditional and customary practices.

Although the proposed South wing, or separate but connected living area, was removed from the use approved by the Board, the maximum single family residence developable area approved remains 4,892 square feet. When submitting construction plans for approval, the area to be developed for the residence may be below, but not greater than 4,892 square feet.

Please acknowledge receipt of this permit and acceptance of the above conditions by signing in the space provided below and returning a copy to us within thirty (30) days.

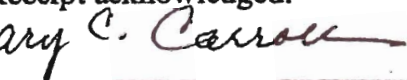
Should you have any questions on this matter please contact Eric Hill our planning staff at (808) 9380.

Aloha,



Dean Y. Uchida, Administrator

Receipt acknowledged:



Applicant/Landowner Signature



Date 3/5/01

Hawaii Board Member

DOCARE/HPD/Na Ala Hele

DOH/OEQC/OHA

County of Hawaii, Department of Planning

Mr. Steven Lim, Carlsmith Ball, 121 Waiianuenue Ave., Hilo, HI 96720

EXHIBIT 5

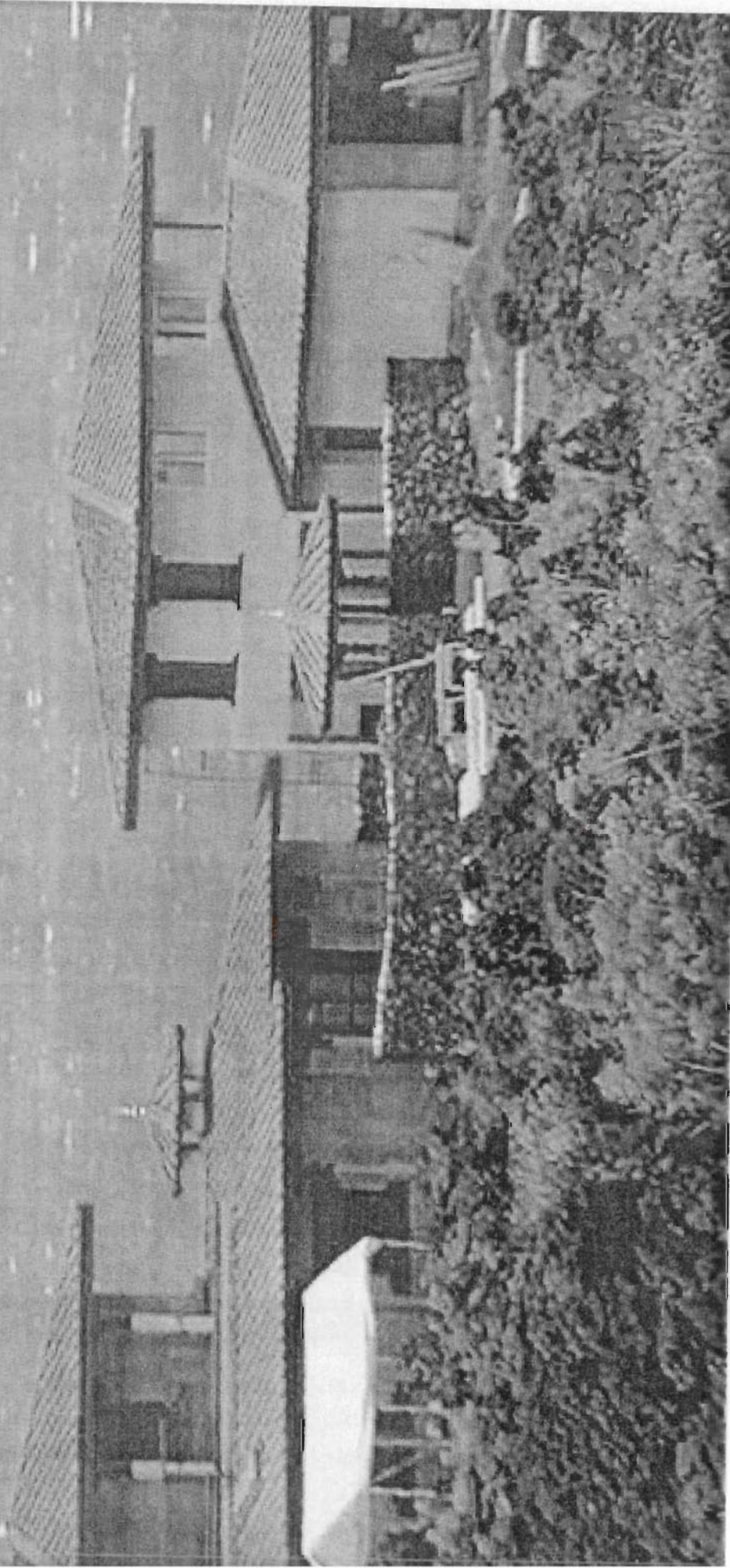


EXHIBIT 6

DEC 7 2004

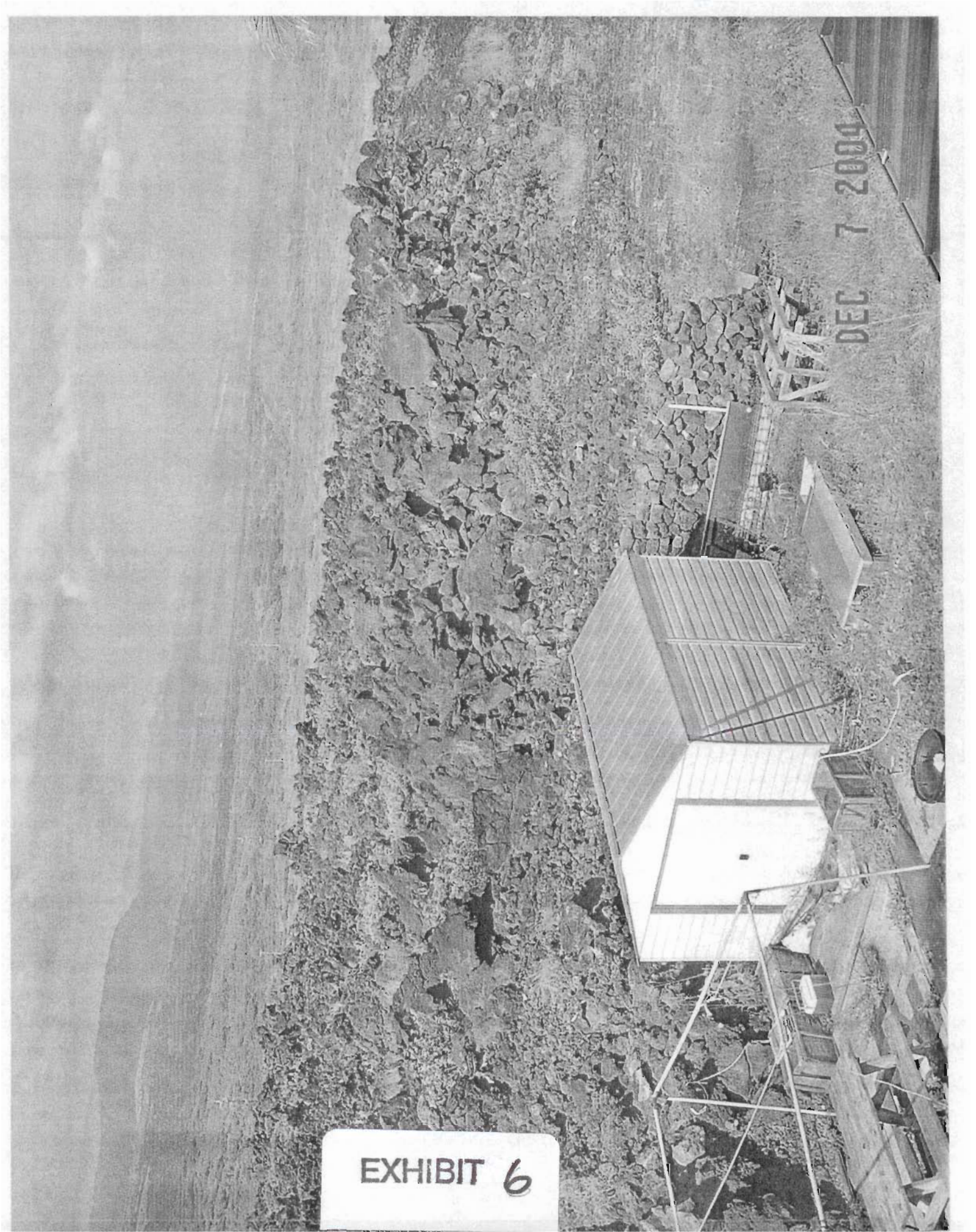




EXHIBIT 7

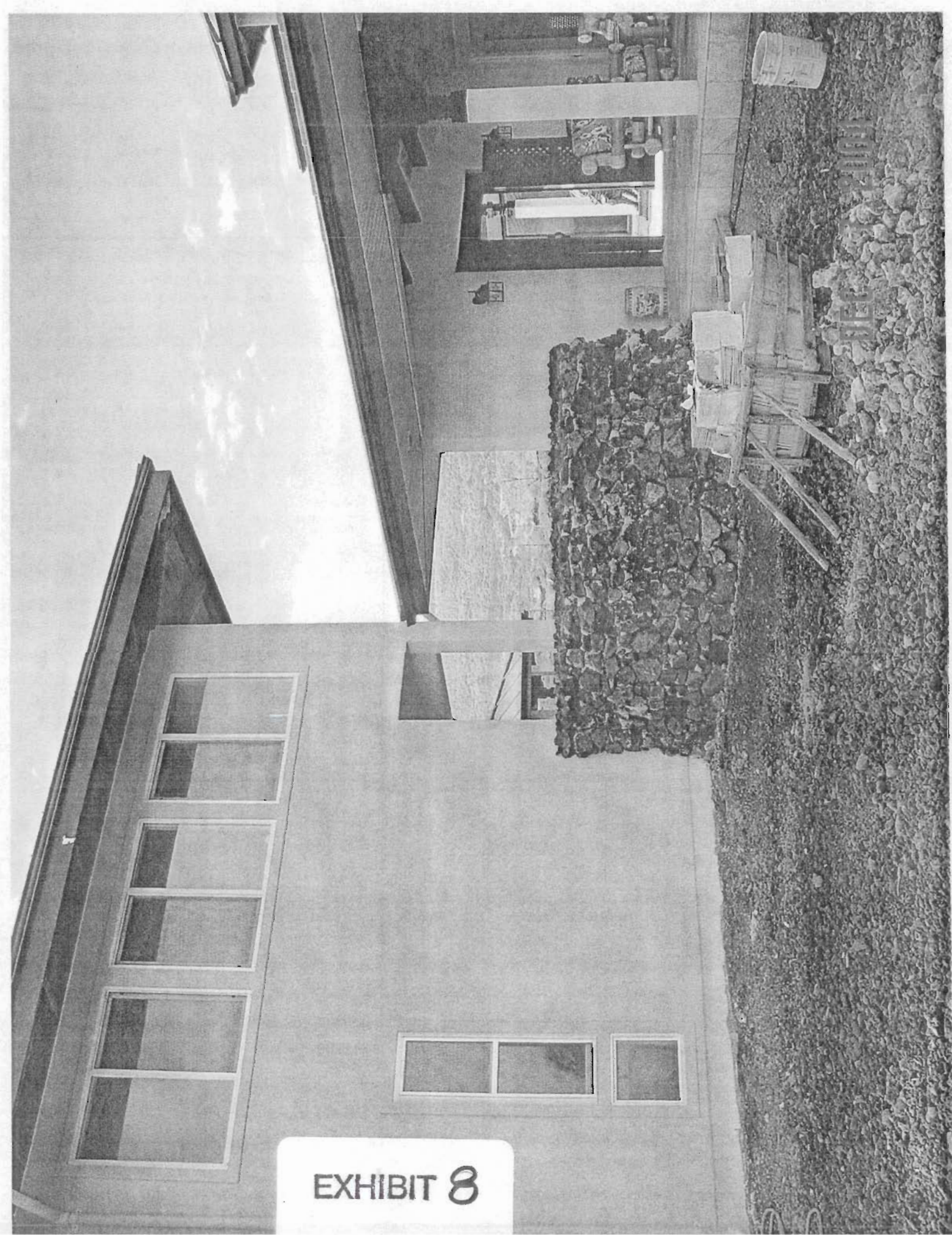


EXHIBIT 8

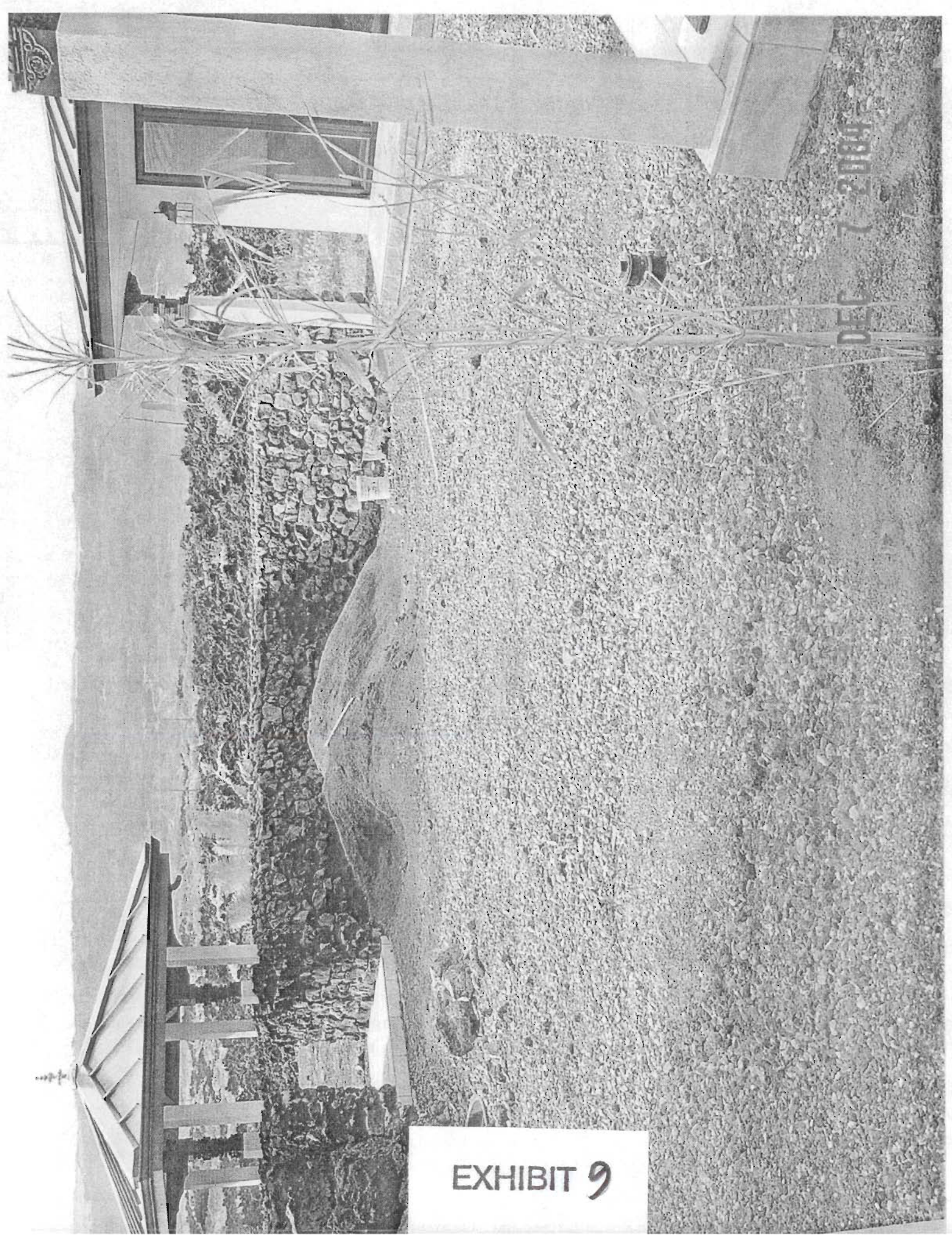


EXHIBIT 9

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON
DEPUTY DIRECTOR - LAND

YVONNE Y. IZU
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF.:OCCL:TM

FILE NO.: HA 05-19

Steven S. C. Lim
Carlsmith Ball LLP
121 Waiānuenue Avenue
P.O. Box 686
Hilo, Hawaii 96721-0686

DEC 29 2004

Dear Mr. Lim,

The Office of Conservation and Coastal Lands (OCCL) would like to thank you and your client for taking the time for OCCL to conduct a site visit of the Carroll Single Family Residence (SFR) located on Conservation District land in Hokukano, Ka'u, island of Hawaii, (3) 9-5-016:036.

The OCCL has some concerns regarding permit compliance of Conservation District Use Permit (CDUP) HA-3002. During the site visit, the following was noted:

An unpermitted structure appears to exist in the northeast corner of the property. **(Exhibit A)**. Please describe the dimensions (length x width x height) and the function of the structure.

Construction of the SFR does not appear to be in accordance with construction plans on file with the Department.

Plans for the entrance and courtyard area have changed significantly from the approved plans. The OCCL is in receipt of revised plans. However, construction of the entry and courtyard area has commenced without Departmental approval.

In addition, the OCCL has no record that the permit approval has been placed in recordable form as a part of the deed instrument of the legal lot of record. As a result of public comments received during a recent meeting held at Naalehu, Ka'u, the Department will request input whether lights emanating from the residence can impact wildlife in the area from the U.S. Fish and Wildlife Service and the Division of Aquatic Resources. Furthermore, the OCCL may seek additional conditions from the Board of Land and Natural Resources to mitigate visual impacts resulting from the development (such as repainting and landscaping).

EXHIBIT 10

OCCL will notify you when the issue will be scheduled before the Board of Land and Natural Resources meeting, at a time, date and location to be announced. You may wish to respond to these matters in writing or contact us at your earliest convenience. Should you have any questions, please contact Tiger Mills of our Office of Conservation and Coastal Lands at (808) 587-0382.

Sincerely,

A handwritten signature in dark ink, appearing to read "Samuel J. Lemmo". The signature is fluid and cursive, with a large, stylized "S" at the beginning and a long, sweeping underline.

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

cc: Chairperson
County of Hawaii, Department of Planning
Hawaii District Land Office

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

121 WALANUENUE AVENUE
P.O. Box 686
HILO, HAWAII 96721-0686
TELEPHONE 808.935.6644 FAX 808.935.7975
WWW.CARLSMITH.COM

DIRECT DIAL NO.

SLIM@CARLSMITH.COM

February 4, 2005

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2005 FEB -9 A 9:22
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

✓ Samuel J. Lemmo
Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Carroll Single-Family Residence at Hokukano, Ka'u, Hawaii,
TMK (3) 9-5-16:36, File No.: HA05-19, CDUP HA-3002

Dear Mr. Lemmo:

We are in receipt of your December 29, 2004 letter regarding the Carroll residence at the above referenced property.

- A. Unpermitted Structure: The structure noted in your letter at the northeast corner of the property is a temporary storage building that is being utilized during the construction for the house, which is almost near completion. At the conclusion of the construction, this structure will be dismantled and removed from the property. The structures dimensions are approximately 12 feet in length, 10 feet in width and 6 feet in height.
- B. Construction of the SFD and related improvements: My client is currently working with your office to process the "as-built" plans for the entryway feature.
- C. Permit in recordable form: Departmental Permit No. HA-2923 was executed by the Carrolls, and a fully executed copy was provided to DLNR on March 7, 2000. Inadvertently, the Permit was not recorded at the Bureau.
- D. Visual Impacts: We are also reviewing the concerns relating to mitigation of visual impacts resulting from the development. As you know, your department approved both the structure and landscaping plans for this project. However, the Carrolls have always been sensitive to mitigate the impacts of this development, even if not technically required under the permit conditions, such as implementing underground utility lines from the access driveway to the house. The exterior wall finish is a synthetic stucco known as dryvit, and has an elastomeric finish

with an integral color. The tan shade "natural white" exterior color was selected by the Carrolls their preferred proposed lighter white in keeping with the earth tones compatibility provision of Exhibit 4, relating to Single Family Residential Standards. The cost of installing the dryvit wall was costly but requires minimal future maintenance, is not suitable for repainting, and is durable against sea sprays.

We are enclosing copies of photographs taken in 1998 that show the existing lava rock bench along the highway of the adjoining State's parcel. These photos clearly show that if not for grading activities by the State and/or County, the view of the house from the highway would have been minimal. The Carrolls were concerned about the State and/or County's grading of the State's parcel at TMK: (3) 9-5-16:26 and wrote letters to these agencies (see attached).

- E. Wildlife Impacts: The shoreline fronting the Carrolls' project consists of several thousands of lineal feet of 10 to 20 ft. high sea cliffs. The only suitable entry area from the sea would be a small sandy beach located approximately 300 to 400 feet north of the Pahala side boundary of the Carrolls' Property. These geographical conditions make it improbable that the Hawksbill Turtles would access land within this area for nesting. In addition, the house is located approximately 1,500 feet from the sea cliffs, and there are no landscaping lights on the Property that would impact wildlife, if any, in the area. The impacts from the lights of night fishermen and automobile lights from the campers driving and fishing along the coastline far exceeds the impact from the Carroll's house.
- F. Recordation of CDUP No. HA-3002: Attached is a copy of CDUA No. HA-3002, which was recorded at the Bureau of Conveyances on 02/01/05 as Document No. 2005-020298.

Upon completion of our preliminary plans I would like to meet with you to discuss the plans and reach a reasonable solution. Until then, we understand that you will not set this matter for any hearing before the Board of Land and Natural Resources until such time as the issues have crystallized. If you have any questions please feel free to contact me.

Very truly yours,


STEVEN S.C. LIM

SSL:KYL
Enclosures
xc: David and Mary Carroll
Neil Erickson - Architect
4819-6724-7104.1

Neil C. Erickson, Architect

82 Ponahawai Street, Hilo, Hawaii 96720

Telephone: (808) 969-4945

July 19, 2005

State of Hawaii
Department of Land & Natural Resources
Office of Conservation & Coastal Resources
P.O. Box 621
Honolulu, Hawaii 96809

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2005 JUL 26 A 8:46
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attn: Sam Lemmo

Re: David & Mary Carroll Residence
95-4667 Hawaii Belt Highway
Naalehu, Hawaii 96772

Tmk: 3rd 9-5-016: 036
Case #: HA 3002

Completion of Dwelling &
Telephone Conversation with Tiger regarding Entry Gate Structure

Dear Mr. Lemmo;

As requested by your staff, I am writing to inform you that the dwelling for the Carroll's has been completed and pending the County of Hawaii final inspection following your staff report and recommendation for the Entry Gate Structure submitted January 2005 for your review. Although the gate was added during construction, it is evident the lava rock face and dark brown gate have a clear effect of helping blend in nearly one-half of the façade with the surrounding landscape.

During your site visit several items were discussed. In particular, I'd like to note that the "Sears" shed that was used during construction has been removed; the landscaping had been installed over six months ago and is slowly growing; the elements – such as effects of the sun and wind carried dust – have weathered the house. These things have increased the visual compatibility of the house with it's surroundings. The Carroll's chose an earth tone color, rather than the one they had originally wanted.

As discussed during your visit and again this morning with Tiger, the spiral staircase and associated tower was removed due to a County of Hawaii requirement which made the stairway redundant. Any space greater than 400 square feet must have a "conventional" stair as an exit. This was added between the Family room and Garage. We felt that the spiral stair, and tower, roof, and spire, could be deleted and lessen the overall "multi-roof" appearance of the home. The living spaces were brought closer together as a result to become one structure.

A side note may be interesting. Even plants indigenous to the area have proven to be very difficult to grow. Only the native species can survive the harsh environment and persistent winds. The courtyard created by the proposed Entry Gate structure and stacked stone walls has been a help but the addition of a connecting element between the Family Room/ Guest Bedrooms and the Pavilion may be necessary to further reduce the wind tunnel effect and better visually connect the spaces. A recommendation such as a double lattice windscreen to visually and structurally join these structures would be welcome.

EXHIBIT 12

Neil C. Erickson, Architect

82 Ponahawai Street, Hilo, Hawaii 96720

Telephone: (808) 969-4945

We look forward to staff recommendations regarding the entry. If you have any questions or concerns please don't hesitate to contact me. Thank you.

Sincerely;



Neil Erickson, Architect

Hawaii Lic. # AR-7428

THIS WORK WAS PREPARED BY ME
OR UNDER MY SUPERVISION AND
CONSTRUCTION OF THIS PROJECT
WILL BE UNDER MY OBSERVATION.

Cc: Carroll
Lim - Carlsmith

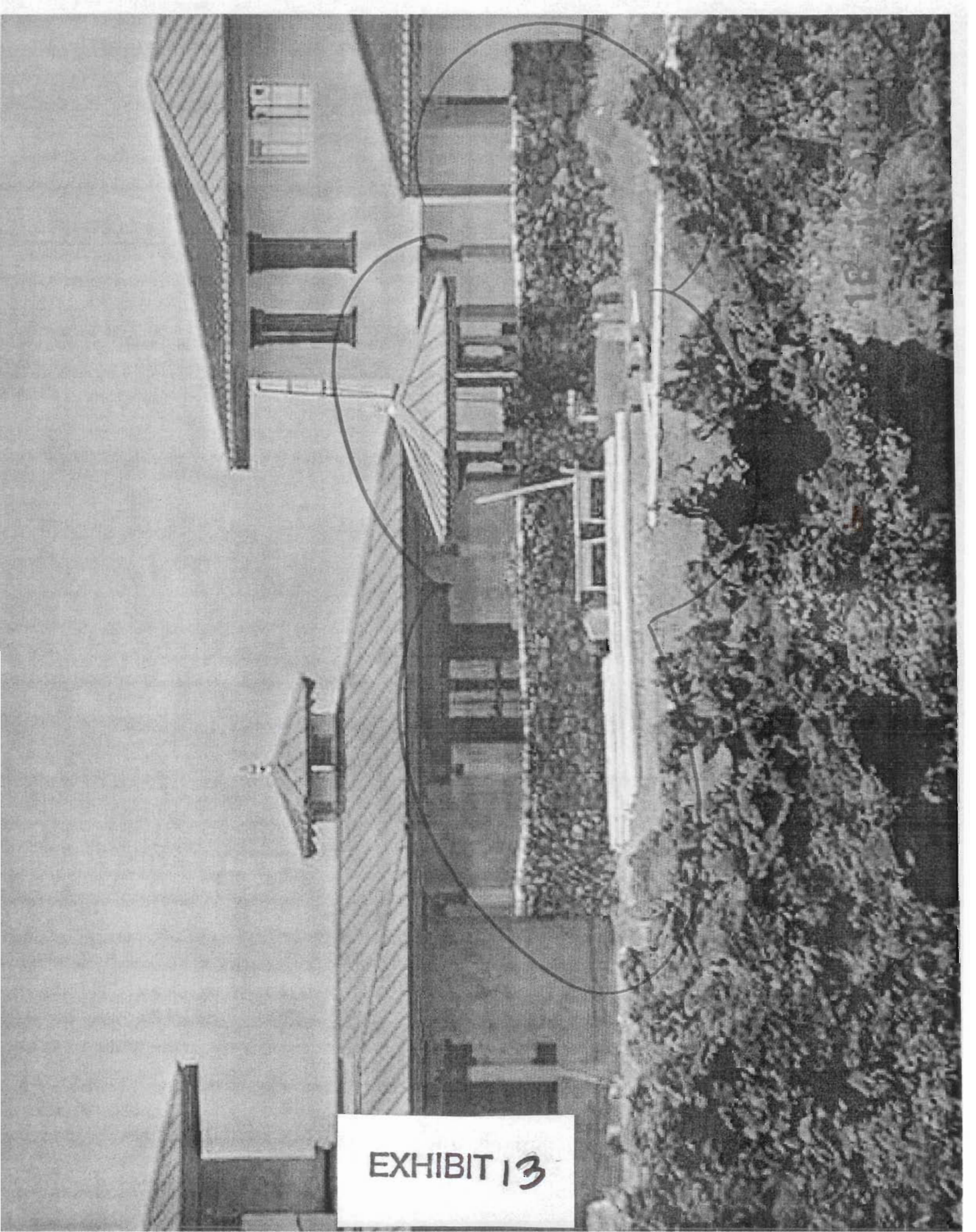


EXHIBIT 13



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

Ref.:PB:TC

File No.:CDUA HA-3002B

JUL - 6 2001

Mary and David Carroll
603 Winsford Rd.
Bryn Mawr, PA 19010

Dear Mrs. & Mr. Carroll,

Subject: Conservation District Use Application (CDUA) No. HA-3002 for the Construction of a Single Family Residence at Kaalaiki and Hokuano, Kau, County of Hawaii, TMK 3rd 9-5-16:36

Department staff has reviewed your proposed building plans. While, the structure does appear to consist of somewhat separated living units, this design will be considered sufficiently integrated to receive preliminary approval of the design. The only change required would be the deletion of the wet-bar sink in the living room of the living area behind the garage. Our concern is that the wet-bar area, with a sink, could be easily transformed into a kitchen. This permit is for construction of a single-family-residence, and pursuant to Chapter 13-5, Hawaii Administrative Rules, Exhibit 4, single-family-residences have only one kitchen. "Kitchen means a facility within the residential dwelling for food preparation, including fixtures, appliances or other devices to wash, prepare, heat, cook, and refrigerate food and wash cooking utensils and dining implements."

We would also like to remind you that Condition 6 of your approval requires the submittal of building plans for the Department's final approval.

Should you have any questions regarding this matter please contact Traver Carroll our planning staff at (808) 587-0439.

Aloha,

Harry Yada, Administrator
Land Division

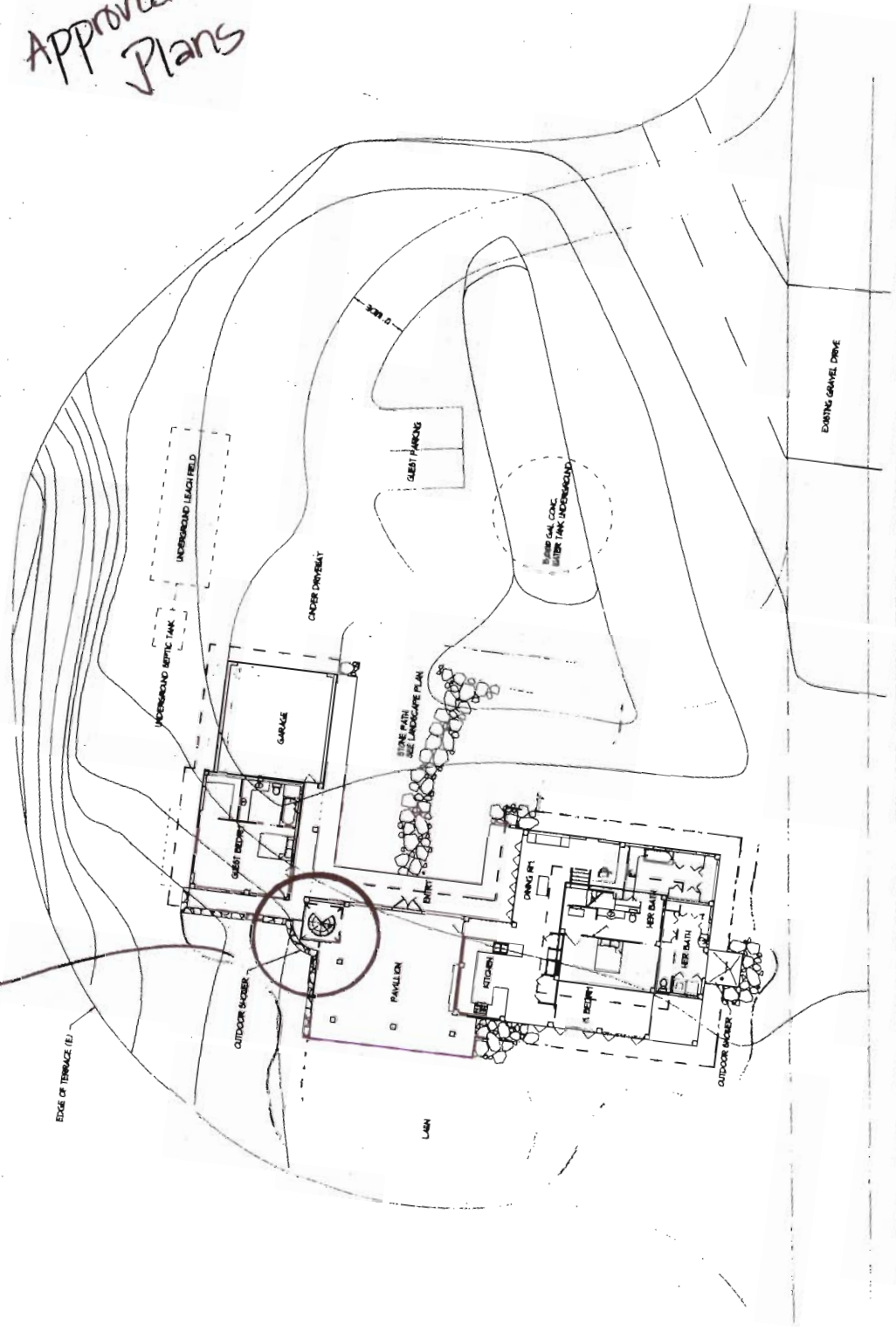
cc: Hawaii Board Member
County of Hawaii, Department of Planning
Mr. Steven Lim, Carlsmith Ball, 121 Waianuenue Ave., Hilo, HI 96720

EXHIBIT 14 1

Approved Plans

Subject area

EXHIBIT 15



ENLARGED SITE PLAN
SCALE: 1" = 10'

Approved
Plans

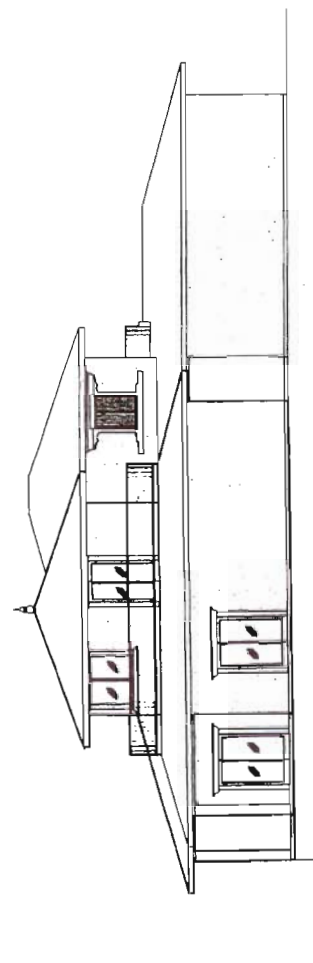
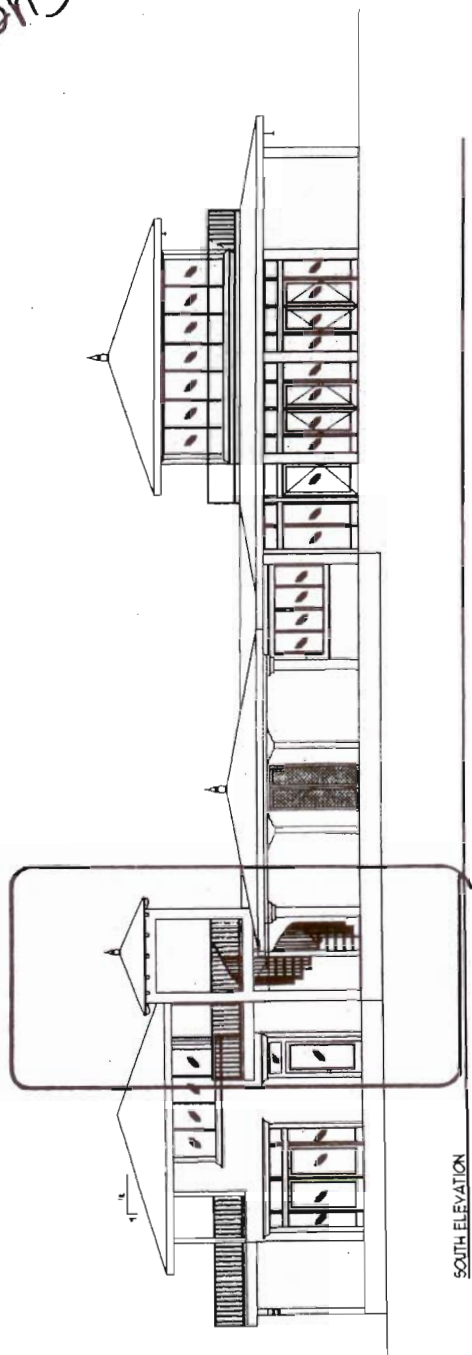


EXHIBIT 16

Approved
Plans

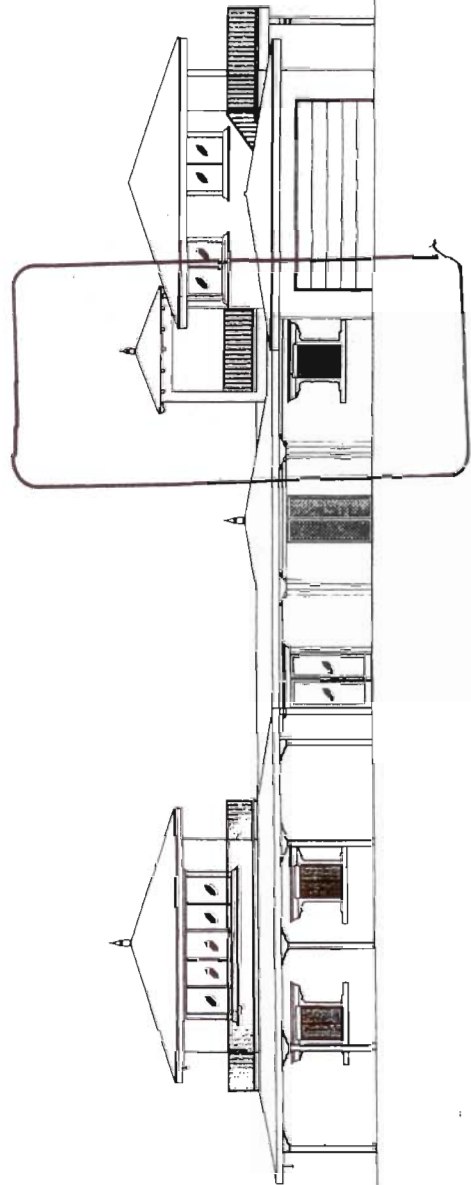
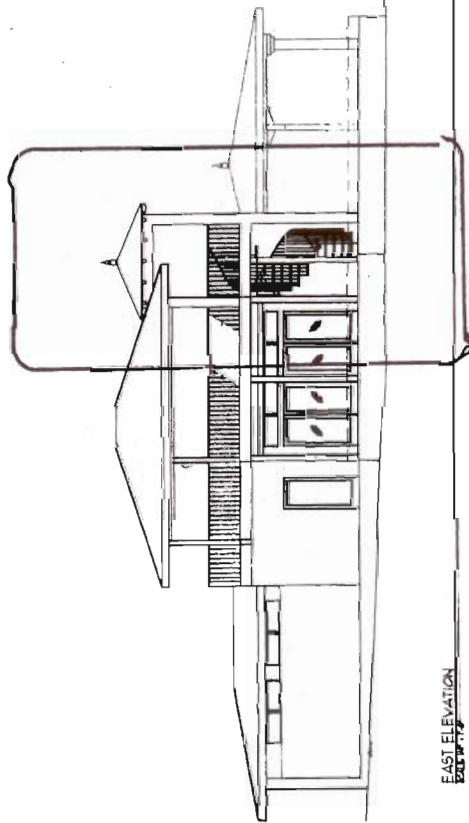


EXHIBIT 17





DEPUTIES
JANET E. KAWAII
LINDA N. SMITH

RECEIVED
DIVISION

STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

HISTORIC PRESERVATION DIVISION
Kalahele Building, Room 558
601 Kamehameha Boulevard
Honolulu, Hawaii 96807

NOV -9 P2:54

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND RESOURCES
ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND
STATE PARKS
WATER RESOURCE MANAGEMENT

2001 JAN -3 A 8:57

November 3, 2000

Steven S.C. Lim
Carlsmith Hall
75-1000 Henry Street, Suite 209
Kailua-Kona, Hawaii 96745

LOG NO: 26418 ✓
DOC NO: 6010ms04

Dear Mr. Lim:

**SUBJECT: Historic Preservation Comments on Proposed Single Family Residence
Hokukano and Kaalaiki, Ka'u, Hawaii Island
TMK: (3)9-5-16:36**

Thank you for the opportunity to review this project, and accompanying Historic Preservation Division staff archaeologist Marc Smith on the July 19, 2000 site inspection.

It is our understanding that your client wishes to build a single family residence in the parcel on a previously graded house pad. The site inspection confirmed the house pad and access road are located at the northwest (*mauka*) margin of the parcel, at an elevation of approximately 80 feet above sea level. The access road and pad, which are located on the leading edge of an *a'a* lava flow, have been graded in the past. The southeast (*makai*) edge of the graded house site drops off steeply to a level *pahoehoe* flow that continues on to the shoreline, approximately 850 feet away.

There are known significant archaeological sites located in the parcel. These include the government beach trail running along the coast, platforms and mounds adjacent to the trail, and habitation sites near Kawa springs located just north of the parcel along the shoreline. Before approving any additional land altering activity in the parcel, we would recommend an archaeological inventory of the parcel.

We believe a house could be constructed on the existing house pad on the condition that there is no additional grading work conducted off the existing pad and access road. If your client agrees to the above condition, then the proposed action will have "no effect" on significant historic sites. In the future, if the parcel is developed, an archaeological inventory survey would be requested by our office prior to any permit approvals. If you have further questions please call Pat McCoy at 692-8029 (Honolulu), or Marc Smith at 933-0482 (Hilo).

Aloha,

DON HIBBARD, Administrator
State Historic Preservation Division

MS:jk

c: Virginia Goldstein, County of Hawaii Planning Department

Post-it Fax Note 7671		Date 11/3/01	# of pages 1
To	Encl Hill	From	
Co./Dept		Co.	
Phone #		Phone #	
Fax #		Fax #	

EXHIBIT 20

EXHIBIT 15
DLNRI-SHPD LETTER



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

Ref.:PB:EAH

File No.:CDUA HA-3002B

SEP 11 2000

Naalehu Public Library
P. O. Box 653
Naalehu, HI 96772

Dear Librarian,

SUBJECT: DRAFT ENVIRONMENTAL ASSESSMENT AND CONSERVATION DISTRICT
USE APPLICATION (Board Permit) HA-3002 By Mary and David Carroll For A
Single-Family Residence With Accessory And Related Improvements At Kaalaiki
and Hokukano, Kau, County of Hawaii, TMK(3)9-5-16:36

Enclosed please find two copies of the draft EA for the subject project. We are providing these documents pursuant to the Environmental Impact Statement rules [Section 11-200-9 (b)(6), Hawaii Administrative Rules], which require that one copy of the draft EA be deposited at the nearest state library in each county in which the proposed action is to occur. We are providing two copies to facilitate public review and comment.

Please make this information readily available to those people who may wish to review it. Also, if possible, please advise that **written comments regarding the project must be postmarked by October 23, 2000, and should be mailed to: Department of Land and Natural Resources, Land Division, Planning Branch, P.O. Box 621, Honolulu, Hawaii 96809.**

Should you have any questions on this matter, please contact Eric Hill of our planning staff in Honolulu at (808)587-0380.

Sincerely,

Dean Y. Uchida, Administrator

c. Hawaii Board member
OEQC

EXHIBIT 21

CARLSMITH BALL LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY LAW PARTNERSHIP

121 WAIANAE AVE
P.O. BOX 686
HILO, HAWAII 96721-0686
TELEPHONE (808) 935-6644 FAX (808) 935-7975
WWW.CARLSMITH.COM
November 7, 2000

Mary Amuro
P.O. Box 216
Naalehu, HI 96772

Re: Applicants: Mary & A. David Carroll; CDUA HA-2981B
Kalaiki and Hokuano, District of Kau, County and State of Hawaii; TMK (3) 9-5-16:36

Dear Ms. Amuro:

We are in receipt of a document that you signed indicating that you have concerns about the proposed construction by the Applicants of a two-story, single-family residential dwelling, approximately 3,150 square feet in living area, and related accessory use improvements (man-made reflection pond, graveled driveway, private water catchment and wastewater treatment systems), and landscaping on approximately 3/4-acre at the mauka/northwest end of the 47.425-acre coastal property. See attached site plan.

The proposed house site is on the formerly graded house pad at the mauka end of the Property, approximately 824 feet from the shoreline. DLNR's Historic Preservation Division has inspected the site and given a verbal clearance for this development. DLNR has also directed that no further development may occur on the remaining makai portion of the Property without further archaeological survey of the area. The County of Hawaii recognizes a mauka-makai public access which starts at the Honuapo and Hionaa ahupua'a (located south of the Property) from the Hawaii Belt Road and gradually traverses diagonally through the Property along the pedestrian Government Beach Trail. Therefore, lateral pedestrian public access to and along the coastal shoreline within the Project Area will remain open.

You are invited to attend an Informational Meeting regarding the Conservation District Use Application as follows:

DATE: Sunday, November 12, 2000
TIME: 1:00 p.m.
PLACE: Property site, approximately 2 miles north of Honuapo Park (Whittington Beach Park)

In recognition of the recent flooding that has affected many people in this area, we will hold a second Informational Meeting on Tuesday, November 14, 2000 at 6:30 p.m. at the Naalehu Community Center.

Should you have questions concerning the Informational Meetings or continue to have additional questions concerning the proposed action, please feel free to contact me. Your letter and this response will be appended to the final environmental assessment to ensure that the document adequately addresses pertinent development and environmental issues.

Very truly yours,

STEVEN S. CLIM

SSL:KYL
cc: Mary & A. David Carroll
Eric Hill, DLNR-Land Management
HonQBQC Kurezu . Hilo . Kona . Maui . Guam . Japan . Los Angeles . Washington, DC . Mexico

CARLSMITH BALL LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY LAW PARTNERSHIP

121 WAIANAE AVE
P.O. BOX 686
HILO, HAWAII 96721-0686
TELEPHONE (808) 935-6644 FAX (808) 935-7975
WWW.CARLSMITH.COM
November 7, 2000

Vernon Takaki
P.O. Box 56
Naalehu, HI 96772

Re: Applicants: Mary & A. David Carroll; CDUA HA-2981B
Kalaiki and Hokuano, District of Kau, County and State of Hawaii; TMK (3) 9-5-16:36

Dear Mr. Takaki:

We are in receipt of a document that you signed indicating that you have concerns about the proposed construction by the Applicants of a two-story, single-family residential dwelling, approximately 3,150 square feet in living area, and related accessory use improvements (man-made reflection pond, graveled driveway, private water catchment and wastewater treatment systems), and landscaping on approximately 3/4-acre at the mauka/northwest end of the 47.425-acre coastal property. See attached site plan.

The proposed house site is on the formerly graded house pad at the mauka end of the Property, approximately 824 feet from the shoreline. DLNR's Historic Preservation Division has inspected the site and given a verbal clearance for this development. DLNR has also directed that no further development may occur on the remaining makai portion of the Property without further archaeological survey of the area. The County of Hawaii recognizes a mauka-makai public access which starts at the Honuapo and Hionaa ahupua'a (located south of the Property) from the Hawaii Belt Road and gradually traverses diagonally through the Property along the pedestrian Government Beach Trail. Therefore, lateral pedestrian public access to and along the coastal shoreline within the Project Area will remain open.

You are invited to attend an Informational Meeting regarding the Conservation District Use Application as follows:

DATE: Sunday, November 12, 2000
TIME: 1:00 p.m.
PLACE: Property site, approximately 2 miles north of Honuapo Park (Whittington Beach Park)

In recognition of the recent flooding that has affected many people in this area, we will hold a second Informational Meeting on Tuesday, November 14, 2000 at 6:30 p.m. at the Naalehu Community Center.

Should you have questions concerning the Informational Meetings or continue to have additional questions concerning the proposed action, please feel free to contact me. Your letter and this response will be appended to the final environmental assessment to ensure that the document adequately addresses pertinent development and environmental issues.

Very truly yours,

STEVEN S. CLIM

SSL:KYL
cc: Mary & A. David Carroll
Eric Hill, DLNR-Land Management
HonQBQC Kurezu . Hilo . Kona . Maui . Guam . Japan . Los Angeles . Washington, DC . Mexico

EXHIBIT 22

CARLSMITH BAIL LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY LAW PARTNERSHIP

121 WAIANUENUE AVENUE
P.O. BOX 686
HILO, HAWAII 96721-0686
TELEPHONE (808) 935-6644 FAX (808) 935-7975
WWW.CARLSMITH.COM

November 30, 2000

Re: Carroll Proposed Residence at Hokukano, Kau, Hawaii; TMK: (3) 9-5-16:36

Dear Interested Parties:

This will report on our site visit to the property held on November 12, 2000 at 1:00 p.m., and our public informational meeting held at the Naalehu Community Center on Tuesday, November 14, 2000 between 6:30 p.m. until approximately 8:30 p.m.

The November 12th site visit consisted primarily of project orientation and description of the proposed residence on top of the existing graded house pad at the mauka end of the property. There were approximately ten attendees, plus Mary Carroll and myself. For those of you who were not on the original petition list, we are enclosing a copy of the original meeting notice and site plan for your information.

At the public informational meeting held on November 14th, there were approximately 25 to 30 attendees, including Mary Carroll and myself. After the project presentation and site orientation, we entertained comments from the community which fell into the following general categories: 1) the Carrolls do not own the fee title to the subject property because the Crown Lands are owned by all Kanaka Maoli, and pursuant to the Law of Nations pact, no fee title can be acquired during this time of truce in the war; 2) the project site is a sacred site which was used for navigational training, spiritual healing and/or contains burials in undisclosed locations within the property; and 3) if allowed to go forward, the CDUA house permit will serve as a precedent for increased development of the surrounding properties in the Kau region. We will incorporate these comments into the Final Environmental Assessment.

As we discussed at our November 14th meeting, the next step is finalization of the Environmental Assessment and filing with the Office of Environmental and Quality Control ("OEQC") and the State Board of Land and Natural Resources. Assuming that the final Environmental Assessment is approved, the BLNR will take action on the CDUA for the house at a public hearing. We will inform you by mail of the date, place and time of that public hearing so that you may attend and give your comments.

On behalf of Mr. and Mrs. Carroll, I would like to thank you for your participation in the process. Please call me if you have any comments or questions on this matter.

Very truly yours,


STEVEN S.C. LIM

EXHIBIT 23

SL:bny

cc: Mary Carroll

DLNR - Eric Hill

Honolulu, HI
Robert D. Triantafyllidis, Esq.

HILO · KONA · MAUI · GUAM · SAIPAN · LOS ANGELES · WASHINGTON, D.C. · MEXICO



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

LAND DIVISION

P.O. BOX 621

HONOLULU, HAWAII 96809

JAN 10 2001

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

Ref.:PB:EAH

File No.: Cдуа HA-3002

MEMORANDUM

To: Genevieve Salmonson, Director
Office of Environmental Quality Control

From: Dean Y. Uchida, Administrator 

Subject: Negative Determination and Finding Of No Significant Impact: Final Environmental Assessment by Mary and David Carroll For a Single-Family Residence with Accessory and Related Improvements At Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16:36

The Department of Land and Natural Resources, Land Division, has reviewed the comments received during the 30-day public comment period, which began on September 23, 2000 and the subject EA. The project road and house would be constructed on a previously graded historic lava flow. Coastal marine food gathering is practiced in the project shoreline area. Significant archeological resources, including: trail, platform, mound, habitation and possible burial sites, occur on the property. According to the applicant, work will only be conducted on the previously graded areas over 800 feet from the shoreline and, therefore, will not impact cultural resources at the subject location.

We have determined that the subject project will not have significant environmental effects and hereby issue a Finding of no Significant Impact (FONSI) for the subject EA. Please publish notice of this in the January 23, 2001 OEQC Environmental Notice.

We have enclosed a completed OEQC Publication Form and four copies of the final EA. My staff will e-mail a completed publication form to your office shortly. Please contact Eric Hill of our planning staff at 587-0380 if you have any questions.

c. Hawaii Board Member

EXHIBIT 24



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

Ref.:PB:EAH

JAN 11 2001

File No.:CDUA HA-3002B

Pahala Public & School Library
P.O. 400
Pahala, HI 96777

Dear Librarian,

Subject: Finding Of No Significant Impact (FONSI): Final Environmental Assessment (EA) for Conservation District Use Application (CDUA) HA-3002 by Mary and David Carroll for a Single-Family Residence with Accessory and Related Improvements at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16: por. 36

Notice of the subject Finding Of No Significant Impact (FONSI) will be published in the January 23, 2001 issue of the Environmental Notice. Therefore, the public challenge deadline for the subject project will occur on February 22, 2001. Enclosed, please find one copy of the final EA for the subject project, which we are providing to facilitate public review. Please make this information readily available to those people who may wish to review it.

Although it has not been scheduled, it is possible that the Board of Land and Natural Resources may hold a hearing in Honolulu on February 9, 2001 for the subject CDUA. If possible, please advise that additional written comments regarding the subject CDUA, HA-3002, may be mailed to: Department of Land and Natural Resources, Land Division, Planning Branch, P.O. Box 621, Honolulu, Hawaii 96809.

Should you have any questions on this matter, please contact Eric Hill of our planning staff in Honolulu at (808) 587-0380.

Sincerely,


Dean Y. Uchida, Administrator

c. Hawaii Board member
OEQC

EXHIBIT 25



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

Ref.:PB:EAH

JAN 11 2001

File No.:CDUA HA-3002B

Naalehu Public Library
P.O. Box 653
Naalehu, HI 96772

Dear Librarian,

Subject: Finding Of No Significant Impact (FONSI): Final Environmental Assessment (EA) for Conservation District Use Application (CDUA) HA-3002 by Mary and David Carroll for a Single-Family Residence with Accessory and Related Improvements at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16: por. 36

Notice of the subject Finding Of No Significant Impact (FONSI) will be published in the January 23, 2001 issue of the Environmental Notice. Therefore, the public challenge deadline for the subject project will occur on February 22, 2001. Enclosed, please find one copy of the final EA for the subject project, which we are providing to facilitate public review. Please make this information readily available to those people who may wish to review it.

Although it has not been scheduled, it is possible that the Board of Land and Natural Resources may hold a hearing in Honolulu on February 9, 2001 for the subject CDUA. If possible, please advise that additional written comments regarding the subject CDUA, HA-3002, may be mailed to: Department of Land and Natural Resources, Land Division, Planning Branch, P.O. Box 621, Honolulu, Hawaii 96809.

Should you have any questions on this matter, please contact Eric Hill of our planning staff in Honolulu at (808) 587-0380.

Sincerely,

Dean Y. Uchida, Administrator

c. Hawaii Board member
OEQC

EXHIBIT 26

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division, Planning Branch
Honolulu, Hawaii

File No.:CDUA HA-3002B
180-Day Exp. Date: February 24, 2001

February 23, 2001

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

- REGARDING:** Conservation District Use Application (CDUA) No. HA-3002 for the Construction of a Single Family Residence at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16:36
- APPLICANT:** Mary and David Carroll
603 Winsford Rd.
Bryn Mawr, PA 19010
- LANDOWNER:** Same
- LOCATION:** Kaalaiki and Hokukano, Kau, County of Hawaii
- TMK:** (3)9-5-16:36 (Lot B-2)
- AREA OF USE:** 17,692 square feet
- AREA OF PARCEL:** 47.5 Acres
- SUBZONE:** General

DESCRIPTION OF AREA AND CURRENT USE:

The subject unimproved oceanfront property is located approximately two miles North of Honuapo Park (Whittington Beach Park), at Kaalaiki and Hokukano, Kau, Hawaii (**Exhibits 1-4**). The conservation district in the specific area of the subject site, South of Punaluu, extends to the Hawaii Belt Road. The property is surrounded by lands in the conservation district Limited, Resource and General Subzones (**Exhibit 2**). There are

As Amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

**Board of Land and
Natural Resources**

CDUA No.: HA-3002B

approximately 12 lots within this immediate conservation district area contained wholly within the conservation district.

Along the shoreline of the Big Island, from South point to just past Pahala at the Hawaii Volcanoes National Park, the location of the conservation district boundary varies, but generally extends not more than 500 feet inland from the coast. This general coastal Kau area is dominated by very large agricultural lots.

The subject 47.5 acre lot, lot B-2, is located within the General Subzone of the State Land Use Conservation District at Hokukano, Kau, County of Hawaii. The subject lot is the result of a consolidation and resubdivision of two adjacent lots. The consolidation and resubdivision was approved by departmental Conservation District Use Permit (CDUP) HA-2923 on July 26, 1999. Lot B-1, TMK parcel 41, is located at the Southern border of the subject parcel adjacent to the ocean.

According to the applicant, the area proposed for the single family residence and access road has been previously graded. There are no present structures on the property. Three to four fresh water springs exist at the Northern side of the property (Exhibit 5). The remains of a rock wall and cattle fencing border the property on its Northwest and Northern boundaries. According to the applicant, a government beach trail, approximately 15 feet wide, runs from Hawaii Belt Road lateral to the shoreline and across the property. Other four wheel drive routes exist on the property.

According to the applicant, the elevation of the property ranges from sea level to 100 feet above sea level. The overall slope of the property is approximately 0 to 6%. Billowy pahoehoe basalt outcrops dominate the topography of the property. The proposed residence site is located outside of the 500 year flood plain. The property has minimal soil and is not well suited for agriculture. According to the applicant, 5% of the subject property area has been covered by lava in "historical" times, but there is no great risk of further lava inundation. According to the applicant and HSS Plat 124 (portion of HSS Plat 124, Exhibit 6), a raised Aa flow extends into the property at the location of the proposed residence.

According to the applicant, electrical and telephone infrastructure exist along Hawaii Belt Road, but the nearest public water system well is 4.3 miles away, and therefore, there is no water service available at the subject location. In the subject area, rainfall averages approximately 70 inches per year.

According to the applicant, no known protected species occur on the property. The predominant vegetation species include koa haole, kiawe, guinea grass, ilima, milo and naupaka. The Aa lava outcrop is bare of vegetation.

The surrounding land is vacant or may be used for animal grazing as a non-conforming use. However, the subject property is not currently used for grazing.

Historic and Archaeological Resources

According to the applicant, the area proposed for the single family residence and access road has been previously graded. The applicant maintains that the only significant archaeological sites on the property, house sites, are located far from the proposed residence site and near the freshwater springs at the Northern portion of the property. According to the applicant, other archaeological sites on the property are important only for information content. According to the applicant, due to the previous grading there are no archaeological sites, burials or burial remains still located at the proposed construction site.

The department does have limited rudimentary archaeological information included in CDUA File No. HA-1065, which indicates, of the two areas surveyed, that there were many archaeological sites on the property in the late 1970s. The sites identified included housesites, platforms, cave shelters, burials, agricultural structures, walls, rock piles, shelters, as well as sites of which no description was given. The rudimentary surveys were limited to an area Makai of the proposed residence site (**Exhibit 7**) and at the Northern side of the property (**Exhibit 8**) and do not indicate the historic or archaeological significance of sites.

Prior to making application around 1978, the previous landowner graded the proposed house site and access road at the Aa lava

outcrop without authorization. In 1977, according to the County of Hawaii, Historic Site No. 4375, consisting of approximately nineteen burial sites, which was nominated to the Hawaii Register of Historical Places, was destroyed. A departmental investigative report dated July 7, 1978 indicates that there was an "ancient cemetery" at the Aa lava outcrop and that numerous grave sites remained along the edge and embankments of the Aa flow outcrop both in front (to the West, Mauka) and behind (to the East, Makai) of the proposed residence site. The report also indicates that historic trails, in addition to the Government Beach Trail, existed on the property. The 1978 investigative report also indicates that the burials on the West property boundary, which existed in 1978, are also located on state land Mauka of the proposed residence site. In conducting this work the previous landowner:

1. Graded a roadway from the Hawaii Belt Road to the Aa lava outcrop and covered it with red cinder;
2. Graded the Aa lava outcrop and made a "reservoir" area;
3. Graded three or more other roadways, possibly historic trails, Makai of the Aa lava outcrop, including the Government Beach Trail; and
4. Blocked access onto the Government Beach Trail at the South side of the property.

The 1978 investigative report recommended disapproval of the 1978 CDUA until a historical report could be prepared.

A previous landowner conducted the unauthorized grading at the property in the 1970s. Areas, including the proposed residence and access road sites, were graded. At the time, 1978, staff did not recommend the previous landowner be fined, as the party was apparently unaware of conservation district zoning permit requirements. On November 22, 1978, the Board approved staff's recommendation regarding the CDUA for residence use and stock grazing on the subject property (CDUA HA-1065):

Denial, without prejudice, on the basis that the SMA clearances from the County of Hawaii, pursuant to the

provisions of Chapter 205A-29(d), HRS, have not been executed.

In the event that the County denies the SMA permit, the applicant shall restore the area to its previous undisturbed condition. Should the County approve the SMA, the applicant shall resubmit the SMA with the CDUA for action.

On November 29, 1978, the previous landowner obtained Special Management Area Permit No. 79 to allow road grading; construction of a water reservoir, fence, ranch quarters building, a windmill; digging a well; installation of a water line and electric service poles, leveling of approximately 12 acres of land; and landscaping. The SMA permit was made subject to several conditions, including: removal of rocks on the "old government road", public pedestrian access to the shoreline along the petitioner's access road from Hawaii Belt Road, no grading of an area occupied by two platforms which abut the Aa bluff and prior Conservation District Use Permit approval.

DESCRIPTION OF PROPOSED USE:

The location of the proposed residence is approximately 825 feet from the shoreline. The applicant proposes to construct a two story, single family residence, including: a man made reflection pond, graveled driveway, private water catchment system and private wastewater treatment system and to engage in landscaping (Exhibit 9).

The existing 12,800 square foot cinder, rock and grass driveway would be graveled. Minimal grading would occur. Likewise, construction of the 711 square foot man made reflection pond would involve minimal grading. The proposed residence and accessory uses would consist of 4,892 square feet of developed floor area. The proposed residence's second floor is included in the total. The main house would have three bathrooms.

A separate, but breezeway connected two story living area of 1025 square feet for family and guests of the applicant would be constructed. An approximately 12 foot by 8 foot "bar" area is identified on the second floor of this separate living area. The separate living area would have two bathrooms. The applicant

identifies the separate guest residence as "an attached South wing living area" designed to "provide a separate, but connected living area for family and guests of the applicants" that "will not be used for any caretaker's cottage or rental use.

Landscaping would include the replacement of existing weed species and include the planting of pohinahina, akia, hinahina kukahakai, mao, naupaka kahakai, nehe, wiliwili, ilima, aalii and ulei. The final landscaping plan, which will depend in part on the availability of planting materials at the time of construction, will be submitted at a later date.

The total area proposed to be occupied by all improvements, including landscaping, but excluding the graveled driveway, is approximately $\frac{1}{4}$ acres.

The entire residence, with the separate living area, is proposed to have five bathrooms.

The applicant calculates that four persons, an average occupancy rate in a family residence, would require 200 gallons of water per day, and that an average of 246 gallons of water per day would be available from the catchment and water storage system. The calculation is based upon an average annual rainfall of approximately 70 inches. However, rainfall is seasonal, in times of low rainfall, water may be trucked in to fill the water storage tank.

PROJECT ALTERNATIVES:

1. No Action:

Disapproval of the subject request is the equivalent of no action;

Alternative locations of the proposed residence are not considered. In response to a comment regarding alternatives for the proposed use identified in the project's environmental assessment, the applicant replies that the "No Action" alternative is a reasonable alternative.

SUMMARY OF COMMENTS:

This application was referred to the divisions of Historic Preservation, Conservation and Resources Enforcement, Na Ala Hele and the Land Division's Hawaii District Land Office for review and comment. The application was also referred to the state Department of Health, Office of Hawaiian Affairs and the County of Hawaii, Planning Department for review and comment.

Relevant agency comment and other comment regarding the application and its environmental assessment are summarized below.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Historic Preservation:

The Historic Preservation Division reports that a site inspection has verified that the subject property does contain a previously graded access road and house pad located on the leading edge of an Aa lava flow. Also, the division reports that:

There are known significant archaeological sites located in the parcel. These include the government beach trail running along the coast, platforms and mounds adjacent to the trail, and habitation sites near Kawa springs located just North of the parcel along the shoreline. Before approving any additional land altering activity in the parcel, we would recommend an archaeological inventory of the parcel.

We believe a house could be constructed on the existing housepad on the condition that there is no additional grading work conducted off the existing pad and access road. If no work is done off the existing pad, then the proposed action will have "no effect" on significant historic sites. In the future, if the parcel is developed, an archaeological inventory survey would be requested by our office prior to any permit approvals.

Staff conferred with Historic Preservation staff in this matter and does understand that grading in the late 1970s destroyed the

**Board of Land and
Natural Resources**

CDUA No.: HA-3002B

burials at the subject location. The recent site visit by and letter from the Historic Preservation Division indicates that work may proceed. Staff understands that burial remains may exist adjacent to proposed construction site areas, but are not likely to be impacted by the construction.

In regards to the proposed use, at this time, staff would recommend that if any burial remains or archaeological sites are encountered during construction, that the applicant be required to contact the Historic Preservation Division and take appropriate actions. While, the present staff recommendation contradicts the recommendation of the 1978 investigative report (by not recommending an archaeological survey prior to construction at the disturbed site), staff is of the opinion that the present recommendation of Historic Preservation should be followed at this time.

Staff understands that Historic Preservation staff, in conducting its review, was unaware of 1970s unauthorized grading outside of the proposed construction area. Staff has notified Historic Preservation staff of the extended grading, but HPD staff have no further comment or suggestions related to how any restoration work could be conducted on the property.

Staff understands that grazing may be conducted in the surrounding area, but is not known to be conducted on the subject property. If animal grazing did occur on the subject property, staff would be inclined to respectfully propose to further condition this permit to restrict grazing in order to protect archaeological features present.

Na Ala Hele:

No objections so long as the Government Beach Trail, as depicted on tax maps, is not adversely impacted in any way.

Staff also conferred with Na Ala Hele program staff regarding the 1970s grading of the property. Na Ala Hele program staff has made a site visit to the subject property at the area of the proposed residence and confirms that road grading took place on areas on the property outside of the proposed construction site. While the Southern area of the property was not inspected, Na Ala Hele program staff reports that there is no reason to

believe that the Government Beach Trail remains blocked on the Southern side of the property. At this time, Na Ala Hele program staff does not have any suggestions related to how any restoration work could be conducted on the property.

STATE OF HAWAII:

Office of Hawaiian Affairs:

Every mitigative effort must be taken to prevent any possible contamination to the fresh water springs and to prevent any harm to the archaeological remains of the nine structures around the several freshwater springs located in the Northern portion of the property.

Applicant Response:

No development will occur anywhere near the springs.

Department of Health:

The subject property is located in a critical wastewater disposal area as determined by the Hawaii County Wastewater Advisory Committee. As there is no existing sewer service in the area, we recommend approval of the project, subject to Department of Health approval for wastewater treatment system plans.

Applicant Response:

Details of the private wastewater system are not yet developed, however, the system utilized will meet all applicable county and state regulations. The location of the proposed wastewater system will not involve commitment to loss or destruction of any coastal resources.

Staff understands that the standard condition which requires the approval of the Department of Health for the proposed private wastewater treatment system would apply.

COUNTY OF HAWAII:

Planning Department:

The subject property is located within the Special Management Area, but the use proposed here is exempt from the SMA definition of development. No work is proposed within the shoreline setback.

OTHER COMMENT:

PETITION:

The applicant and department received a petition from 155 Kau, Hawaii residents opposing the subject development within conservation land and calling upon the Board to deny the subject application. In the petition, the petitioners state that the proposed use "will have negative affects on our traditional and cultural ties to the aina, relative to Kau."

Applicant Response:

The applicant invited all petitioners, by letter, to an informational meeting at the property and another informational meeting at the Naalehu Community Center both in November, 2000.

The applicant notified all petitioners and the department of certain comments received at the informational meetings. The applicant reported that comments from the community included:

Applicant Informational Meeting Comment: 1) The applicant does not own the fee title to the subject property because the Crown Lands are owned by all Kanaka Maoli, and pursuant to the Law of Nations pact, no fee title can be acquired during this time of truce in the war;

Applicant Informational Meeting Comment: 2) The project site is a sacred site which was used for navigational training, spiritual healing and contains burials in undisclosed locations within the property; and

Applicant Informational Meeting Comment: 3) If allowed to go forward, the CDUA house permit will serve as a precedent for

increased development of the surrounding properties in the Kau region.

In regards to the comment related to the precedent setting nature of the application, staff agrees. If the proposed residence were to be approved, it would be the first residence approved within the coastal area at Kau, Hawaii. Planning Branch records indicate that there are only two approved residence uses within the conservation district at tax Zone 9, District of Kau. The two residences are permitted non-conforming uses located at Volcano adjacent to the Puna District. However, other non-conforming residence use may occur at Kau. No residence use, except possible non-conforming use, is presently authorized within the shoreline conservation district area of the District of Kau.

At the subject coastal Kau, Hawaii location, the entire lot is zoned conservation. While other uses of the subject location may be made besides residence use, staff is of the opinion that allowing the subject residence use, if it is not detrimental to cultural or natural resources, is appropriate and while other uses of the property may be made, allows the owner reasonable use of his property. This is due to fact that the subject lot is zoned entirely within the conservation district. If the lot were split zoned, staff would be inclined to analyze alternative house site locations further.

The subject coastal Kau, Hawaii conservation district location is generally a rugged, rural landscape and, except for cattle grazing, is generally untouched by development. The proposed use will impact views of the largely untouched, rugged, rural, and archaeologically rich coastal landscape inland from the coast. Views enjoyed by boaters and coastal trail users will be impacted. The area is not a scenic mountainside resource for an urban area.

Staff is of the opinion that since lots entirely within conservation district at Kau, Hawaii are generally large, the subject lot is 47.5 acres, the proposed use would set an acceptable precedent for impacts upon the coastal landscape.

CULTURAL, HISTORICAL AND ARCHAEOLOGICAL RESOURCES:

In the project's environmental assessment the applicant further reports that area residents have stated: 1) opihi, limu, fish and other coastal strand resources are gathered by Native Hawaiians at the subject property; and 2) it has been contended that the previously graded house pad is located over a burial site.

Applicant Response:

Due to the location of the proposed house site away from coastal marine food resources, we anticipate no adverse impacts to the resources as a result of implementing the proposed action.

There are no gates or fences proposed by the applicant that would restrict access for the practice of traditional activities on the property.

Staff agrees with the applicant and is of the opinion that access to coastal marine food resources would not be impacted by the proposed use.

DAMSELFLIES:

The fresh water spring located on the property provide habitat for a dwindling population of damselfly, which are unique to the area and selective in breeding customs.

Applicant Response:

A series of fresh water springs are located along the extreme Northern portion of the property, approximately 2,500 feet North of the proposed residence site. Recent surveys conducted by the Bishop Museum indicate that the current status of the Hawaiian Megalagrarian damselfly species/subspecies may exist in remote sections of Puna or upslope Kau. The proposed development will not involve degradation of the spring ecosystem.

PROPOSED WATER WELL:

The department's letter of acceptance for the subject application noted: "If you intend to seek conservation district

zoning approval for the proposed development of a water well, discuss impacts to the springs and other relevant information."

Applicant Response:

The applicant may seek Water Commission approval for the construction of a water well to be located below the bluff (Aa lava flow) in the area of the proposed residence approximately 2,700 feet South from the natural springs. Preliminary discussions with CWRM staff indicate that pursuant to guidelines, any production well should be located 1,000 feet from the septic tank.

The applicant briefly refers to a proposed water well in his application and indicates that it may be necessary to construct a well to provide adequate water supply. Staff understands that archaeological surveys have not been conducted for the proposed well area.

REFLECTION POND:

Please describe the proposed reflection pond. Is it an existing natural feature? How will the natural environment be changed?

Applicant Response:

The natural sloping topography of the area of the proposed man made reflection pond requires minimal grading.

According to CDUA File No. HA-1065, it appears that the site of the proposed reflection pond would be located in an area that was graded and excavated by a previous property owner for a "reservoir". Staff presumes that the pond will be supplied with water from the applicant's proposed catchment system and that more detail about the reflection pond, including whether and how water will be restrained from draining through the Aa lava pond bottom, would be supplied during the construction plan approval process.

SOUTH WING - GUEST HOUSE:

Concern has previously been expressed regarding single family residences that appear to be fragmented into two or more

separate structures, a main structure and guest additions, and that such uses should not be permitted. Some have recommended that guest quarters be structurally integrated into the main family residence, and not linked by a covered walkway or breezeway as such structures have the potential to be misused for things such as bed and breakfast units.

Applicant Response:

Since the time of the initial application, the applicant has reduced the size of the proposed residence and pond to comply with the administrative rules.

According to the administrative rules, breezeways are not calculated into the developed area. The attached South wing living area is included within the developed floor area and is not a second home and will not be used for any caretaker's cottage or rental use.

Chapter 13-5, HAR, provides for only one kitchen in any single family residence. A kitchen is defined as a facility for "food preparation, including fixtures, appliances or other devices to wash, prepare, heat, cook and refrigerate food and wash cooking utensils and dining implements.

The applicant proposes a 12' by 8' bar area, including a sink and refrigerator in the proposed second guest addition. Staff is of the opinion that the proposed detached guest house has a high potential to be misused as some kind of vacation rental. This potential is increased by the inclusion of the bar area. Staff is also of the opinion that the proposed bar area resembles a kitchen. Staff is of the opinion that the bar area should be removed from any approved use of the separate guest house because it would increase the temptation to use the separate guest house as a vacation rental in the future. Although the applicant maintains that the proposed residence will not be used as a rental, the applicant may not retain ownership of the proposed five bathroom residence in the future.

ANALYSIS:

Following review and acceptance for processing, the department has found that:

1. The proposed land use is considered an identified land use within the General Subzone of the Conservation District and is specifically identified under Section 13-5-24(c) (R-8), of the Hawaii Administrative Rules; and
2. No public hearing was required since the use is not of a commercial nature.
3. In conformance with Title 11, Chapter 200, Hawaii Administrative Rules and Chapter 343 Hawaii Revised Statutes, a Finding of no Significant Impact (FONSI) has been filed by the Department with the Office of Environmental Quality Control (OEQC) for the proposed project. Notice of the FONSI was published in the January 23, 2001 OEQC Environmental Notice; and
4. Documentation of the project's compliance with the provisions of Chapter 205A, HRS relating to the Special Management Area (SMA) requirements was found to be complete in a letter from the County of Hawaii, Planning Department, dated September 25, 2000 which states that the subject proposed land uses are exempt from the need to obtain an SMA permit.

The following discussion evaluates the merits of the proposed land use by applying the criteria established in section 13-5-30(c) HAR:

The Proposed Land Use Is Consistent With The Purpose Of The Conservation District:

The purpose of the Conservation District is to regulate land use for the purpose of conserving, protecting, and preserving the important natural resources of the state through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

The proposed land use involves development at less than typical urban density and, with staff's recommended conditions, will have a limited impact upon the long-term sustainability of

Conservation District resources. The proposed land use will have no noticeable impact on public health, safety and welfare.

The Proposed Land Use Is Consistent With The Objectives Of The General Subzone:

The objective of the General Subzone is to designate open space where specific conservation uses may not be defined, but where urban use would be premature.

The proposed land use will reduce the open space value of the General Subzone of the Conservation District at the proposed location. However, as the Kau area is characterized by large lots and is not immediately adjacent to an existing urban area, staff is of the opinion that the proposed use will have a minimal impact upon open space value.

The Proposed Land Use Complies With The Objectives And Guidelines Contained In Chapter 205A, HRS, Entitled "Coastal Zone Management" Where Applicable:

Recreational Resources:

The proposed residential use will not impede public access to or along the shoreline or the Government Beach Trail.

Historic and Cultural Resources:

The subject property contains significant historic sites. Staff understands that the proposed residence would be constructed on an area that has been previously disturbed and that no burials or burial remains presently exist at the proposed residence site. With the condition that if burials or burial remains are encountered, the applicant contact the Historic Preservation Division and take appropriate action, staff has no objection to the application.

Scenic and Open Space Resources:

The proposed land use will reduce the open space value of the General Subzone of the Conservation District at the proposed location. However, as the area is characterized by large lots and is not immediately adjacent to an existing urban area, staff

**Board of Land and
Natural Resources**

CDUA No.: HA-3002B

is of the opinion that the proposed use will have a minimal impact upon open space value.

Coastal Hazards:

The subject parcel lies mauka of the 500 year coastal flood zone. The parcel is located within the tsunami zone. Residence construction within a coastal high hazard zone is an identified use within the conservation district.

The Proposed Land Use Will Not Cause Substantial Adverse Impact to Existing Natural Resources Within the Surrounding Area, Community or Region:

No substantial adverse impact to area resources is anticipated as a result of the proposed land use. No significant long term impacts are anticipated from construction of the single-family residence.

The Proposed Land Use, Including Buildings, Structures, And Facilities, Shall Be Compatible With The Locality And Surrounding Areas, And Appropriate To The Physical Conditions And Capabilities Of The Specific Parcel Or Parcels:

The property does not contribute to scenic mountain views, due to the property's coastal location.

According to the applicant, the proposed use has been designed to harmonize with the existing physical environment. Pedestrian access along the shoreline will not be curtailed since pedestrian public shoreline access is secured along the coastline. The proposed design and location of the residential dwelling and related accessory improvements will ensure that the development is compatible with the visual environment.

Staff has considered that the water supply may be inadequate, especially during dry months, from the proposed water catchment system for the proposed use. Rainfall may possibly be adequate to supply the catchment system during wet months. However, during dry months, approximately April through August, rainfall drops dramatically. During these months it is likely that the applicant would rely upon water hauled in to replenish the water tank.

Staff has considered that the number of proposed bathrooms may be excessive in light of the water supply limitations. However, Staff is uncertain whether additional bathrooms would increase the demand for water and, therefore, reserves a recommendation regarding water supply and the number of proposed bathrooms.

The Existing Physical And Environmental Aspects Of The Land, Such As Natural Beauty And Open Space Characteristics, Will Be Preserved Or Improved Upon, Whichever Is Applicable:

According to the applicant, the proposed use has been designed to harmonize with the existing physical environment. Pedestrian access along the shoreline will not be curtailed since pedestrian public shoreline access is presently secured along the coastline at the Government Beach Trail. According to the applicant, the proposed design and location of the residential dwelling and related accessory improvements will ensure that the development is compatible with the visual environment.

Subdivision of Land Will Not Be Utilized to Increase the Intensity of Land Uses in the Conservation District:

The proposed land use does not include the subdivision of the underlying parcel.

The Proposed Land Use Will Not Be Materially Detrimental to the Public Health, Safety, and Welfare:

Staff is of the opinion that construction of the proposed residence would not be detrimental to the public, health, safety and welfare.

DISCUSSION:

Staff is of the opinion that the proposed "South wing, separate, but connected living area" portion of the proposed residence has a high potential use as a vacation rental. Staff is of the opinion that any vacation rental use of the subject property would have an unacceptable impact on the coastal landscape and set an unacceptable conservation district development precedent and, therefore, recommends that the "South wing or separate, but

connected living area" portion of the proposed residence be denied.

Staff further recommends that: 2) the Government Beach Trail not be blocked; 3) development of any water well or other uses on the property receive further Board approval due to historic site concerns.

The applicant briefly refers to a proposed water well in his application and indicates that it may be necessary to construct a well to provide adequate water supply. Staff understands that archaeological surveys have not been conducted for the proposed well area. Therefore, staff is of the opinion that this approval should not include approval for a well, but that the applicant may seek CDUA approval for a well as an amendment to this permit.

The applicant has identified no alternatives to the proposed use other than "No Action". According to the applicant, "no action" is an acceptable alternative. Staff understands that no other locations for the proposed residence on the property were considered. While staff questions whether the proposed location of the residence is advisable, due to the former presence of burials, staff understands that archaeological sites exist throughout the property and that the proposed location, as it has been previously disturbed, is the best alternative disclosed by the applicant.

As reported by the applicant, area residents have stated that the property is a sacred site and development on the property should not be allowed. The applicant has not responded to this comment. However, correspondence from the applicant states that he will notify area residents who have indicated their interest in the subject application of the date, time and place of the decision making Board meeting.

1970s GRADING

The subject property contains significant historic sites. Staff understands that the proposed residence and access road would be constructed in an area that has been previously disturbed and that no burials or burial remains presently exist at the proposed residence site. With the condition that if burials or

**Board of Land and
Natural Resources**

CDUA No.: HA-3002B

burial remains are encountered at the proposed construction site, the applicant contact the Historic Preservation Division and take appropriate action, staff has no objection to the application.

Staff understands that SMA permit no. 79 is not relevant to the subject application as the applicant proposes different land uses than were approved by the 1978 SMA permit. At this time, the County of Hawaii reports that the subject property is located within the Special Management Area, but the present proposed use is exempt from the SMA definition of development. No work is proposed within the shoreline setback.

The Board's action of November 22, 1978 regarding residence and stock grazing use on the subject property (CDUA HA-1065) required SMA clearance and the submission of SMA clearance with subsequent CDUA application. At this time, the applicant has obtained SMA clearance in connection with the subject application and, pursuant to the Board's action of November 22, 1978, need not restore the area to its previous undisturbed condition.

The unauthorized grading at the subject location in the 1970s represented a violation of conservation district law and rule. Staff is of the opinion that the Board's action of November 22, 1978, regarding CDUA HA-1065, resolved violations on the parcel. Staff understands that it was the Board's intention in 1978 to only require restoration of the land if SMA permit or clearance could not be obtained. Such clearance has been obtained in connection with the subject application.

Staff is uncertain whether restoration 1970s grading work on the subject property at this time is advisable. In connection with the subject application, staff considered recommending a requirement for restoration of the land outside of the proposed construction site. Na Ala Hele program and Historic Preservation staff do not propose any such restoration. Therefore, at this time, staff does not recommend a requirement to restore the land outside of the proposed construction site.

STAFF RECOMMENDATION:

That the Board of Land and Natural Resources approve Conservation District Use Application (CDUA) No. HA-3002 for the construction of a single family residence at Kaalaiki and Hokukano, Kau, County of Hawaii, TMK 3rd 9-5-16:36, subject to the following conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of Chapter 13-5, Hawaii Administrative Rules (HAR), including the standard conditions listed in 13-5-42, HAR;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
3. The applicant shall comply with all applicable Department of Health administrative rules;
4. The single family dwelling shall not be used for rental or any other commercial purposes;
5. The applicant shall provide documentation (e.g. book and page or document number) that this permit approval has been placed in recordable form as a part of the deed instrument of the legal lot of record, prior to submission for approval of subsequent construction plans;
6. Before proceeding with any work authorized by the department or the board, the applicant shall submit four copies of the construction plans and specifications to the chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set

forth in the permit application. Three of the copies will be returned to the applicant. Plan approval by the chairperson does not constitute approval required from other agencies;

7. Any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and, unless otherwise authorized, shall be completed within three years of the approval of such use. The applicant shall notify the department in writing when construction activity is initiated and when it is completed;
8. All representations relative to mitigation set forth in the accepted environmental assessment or impact statement for the proposed use are incorporated as conditions of the permit;
9. The applicant understands and agrees that the permit does not convey any vested rights or exclusive privilege;
10. In issuing the permit, the department and board have relied on the information and data which the applicant has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
11. When provided or required, potable water supply and sanitation facilities shall have the approval of the department of health and the board of water supply;
12. Provisions for access, parking, drainage, fire protection, safety, signs, lighting, and changes on the landscape shall be provided;
13. Where any interference, nuisance, or harm maybe caused, or hazard established by the use, the

applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;

14. During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
15. Cleared areas shall be revegetated within thirty days unless otherwise provided for in a plan on file with and approved by the department;
16. Use of the area shall conform with the program of appropriate soil and water conservation district or plan approved by and on file with the department, where applicable;
17. Access to the Government Beach Trail shall not be blocked;
18. If, during construction, historic sites, burials or burial remains are encountered, construction shall stop immediately, the Division of Historic Preservation notified immediately and appropriate measures approved or required by the department implemented prior to subsequent construction;
19. The single family residence shall not contain any "South wing or separate, but connected living area" or any other similar design;
20. This permit does not include approval for development of a water well. Any water well use, or any other use outside of the access road and residence construction sites shall require an amendment to this permit;
21. Other terms and conditions as prescribed by the chairperson; and
22. Failure to comply with any of these conditions shall render this permit void.

**Board of Land and
Natural Resources**

CDUA No.: HA-3002B

Respectfully submitted,



Eric A. Hill,
Staff Planner



Approved for submittal:



GILBERT S. COLOMA-AGARAN, CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

APPROVED AS AMENDED: The Board amended the staff recommendation to include the following:

23. Access will not be denied for people accessing the property who are involved in traditional and customary practices.



EXHIBIT 28



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF AQUATIC RESOURCES
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

March 16, 2005

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2005 MAR 22 A 7:54
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

TO: Sam Lemmo, Administrator, OCCL

THROUGH: Francis Oishi, Acting Administrator, Aquatic Resources
Alton Miyasata, Acting Program Manager, Aquatic Resources *AM*

FROM: Dave Gulko, Aquatic Biologist, Aquatic Resources *DG*

SUBJECT: Request for Comments Regarding A Single Family Residence's Potential Impacts on Sea Turtles and Their Hatchlings, near Kaalaiki, Ka'u, Island of Hawai'i

Based upon my review of the attached correspondence, site maps and visuals, and available literature on lighting impacts on sea turtles, the following comments are submitted for your consideration:

1) OVERALL IMPRESSIONS.

The home represents the first substantial building in the immediate area in modern times, in an area whose immediate coastline is well-known for a number of small rocky beaches where the critically-endangered Hawksbill sea turtle (*Eretmochelys*

imbricata) is known to nest. Presumably, nesting hawksbills and emerging hatchlings for decades (or longer) have not been exposed to disorientation from long-term, continuous, shore-based lights. Elsewhere, coastal lighting is well-known as a major impediment to both successful nesting and survival of emerged sea turtle hatchlings prior to reaching deeper waters (Gulko, 2004; Witherington & Martin, 2000). Specifically, coastal lighting has been identified elsewhere as a major concern related to the recovery of Hawksbill sea turtles (Meylan & Donnelly, 1999).

The architecture as represented in photos and blueprints features large ocean-facing windows and outdoor (and presumably, lighted) covered lanai areas and grounds approximately eight hundred feet from the shoreline and an unknown elevation above sea level. It is our opinion that the existing structure as described would have the potential to cause negative impacts on nesting sea turtles and their hatchlings.

2) POSSIBLE MITIGATION RECOMMENDATIONS (Please note that these recommendations are general ones, and lack information regarding site-specific and structure-specific artificial light impacts associated with this specific structure in Ka'u.)

- a) Erect a Artificial Light Screen: This could be made from a variety of natural (wood fence, stone fence) or artificial (plastic, nylon shade cloth) materials, and could be permanent or temporary in nature (i.e. erected during the annual nesting, hatching seasons). Height of the fence would be based on the angle of light penetration from the second story of the structure down to the ground floor based upon the emerged slope of the land to the beach nesting habitats and the exposed shoreline waters. Note that the screen would need to be erected far enough inland and away from the nesting habitats such that no interaction with nesting turtles or hatchlings would occur.

- b) Plant a Vegetation Buffer: A vegetation buffer, if properly designed, could shield the majority of light from the structure from reaching the prime nesting habitats and beach/access waters where impacts to hatchlings would be maximized. A temporary light screen as described above would need to be erected until such time as the vegetation had grown to a sufficient height and thickness to block the artificial light from the structure.

- c) Re-orient Outside Lighting: For outside lights that are directional, major decreases in beach illumination can be achieved through aiming the light away from the beach and providing enhanced shielding of the light's reflector such that the beam of emitted light is narrowed. Often the best way to do this is through enhancement of the outdoor light's hood. Hoods (or shields) can be fabricated from opaque or non-opaque material and should be done in such a manner such that the light fixture is shielded on at least three sides (or an arc of 180°). Finally, given the elevation of the structure above the coastal and beach habitat, and the intermittent rocky habitat between the structure and the beach, reducing the mounting height of the outdoor lights may effectively and significantly reduce artificial light enhancement of the habitats of concern.

- d) Re-Fit Outdoor Light Fixtures: Witherington and Martin (2000) recommend re-fitting outdoor light fixtures as one of the best ways to minimize artificial light impacts. They recommend low-mounted, louvered bollard fixtures for lighting walkways, pools, patios, entranceways, driveways, parking areas and other areas near beaches. Bollards with louvers prevent light from projecting upward; but care needs to be taken with properly orientating the louvers. Additional recommended lighting fixtures includes downlighting to replace non-directional outdoor fixtures. Downlighting needs to be done in such a manner so that it is recessed enough as to not be visible from the shore or nearshore waters; as mentioned earlier, this is most effective when the height of the fixture is minimized. Additional care needs to be taken with minimizing the reflective nature of the interior surface of the fixture. Step lighting might also be effective

for lighting stairways, walkways and external grounds; especially given the elevation of the structure over the adjacent beach area.

- e) Window Coverings: Opaque blinds or curtains can effectively limit internal lights from impacting the areas of concern; however, they would need to be used every night, all night, during the annual Hawksbill nesting season, and would need to cover all windows where escaping light could have an effect. Window coverings will not address external light source issues.
- f) Window Tinting: Window tinting has been shown to be effective elsewhere when such tinting achieves an “inside-to-outside light transmittance ratio of 45% or less” (Eckert & Horrocks, 2002).
- g) Reduce Structure and Vehicle Illumination to the Minimum Necessary: This is a behavioral modification that can be incorporated during nesting season.

In conclusion, the review of the original CDUA should have addressed these issues given what's known about Hawksbill use of the nearshore and beach areas in this region and the lack of history of structures at this site. It is difficult to properly assess potential impact lacking the full documentation after the fact. However, we do feel that based on the limited material available to us for review there is a concern regarding the existing situation. Specifically, based on the information at our disposal, we believe that the potential impacts on endangered Hawksbill sea turtles posed by night-time lighting at this site are substantial and recommend consideration of mitigative strategies in consultation with the NMFS Office of Protected Resources and the USFWS Ecological Services.

References cited:

Eckert, KL & Horrocks, JA (2002). Sea Turtles and Beachfront Lighting: An Interactive Workshop for Industry Professionals and Policy- Makers in Barbados. Wider Caribbean Sea Turtle Action Network Technical Report #01. 44 pp.

Gulko, DA & Eckert, KL (2004). *Sea Turtles: An Ecological Guide*. Mutual Publishing, Honolulu, HI. 168 pp.

Meylan, AB & Donnelly, M (1999). Status justification for listing the hawksbill turtle (*Eretmochelys imbricata*) as Critically Endangered on the 1996 IUCN Red List of Threatened Animals. *Chelonian Conservation & Biology* 3(2): 200 – 224.

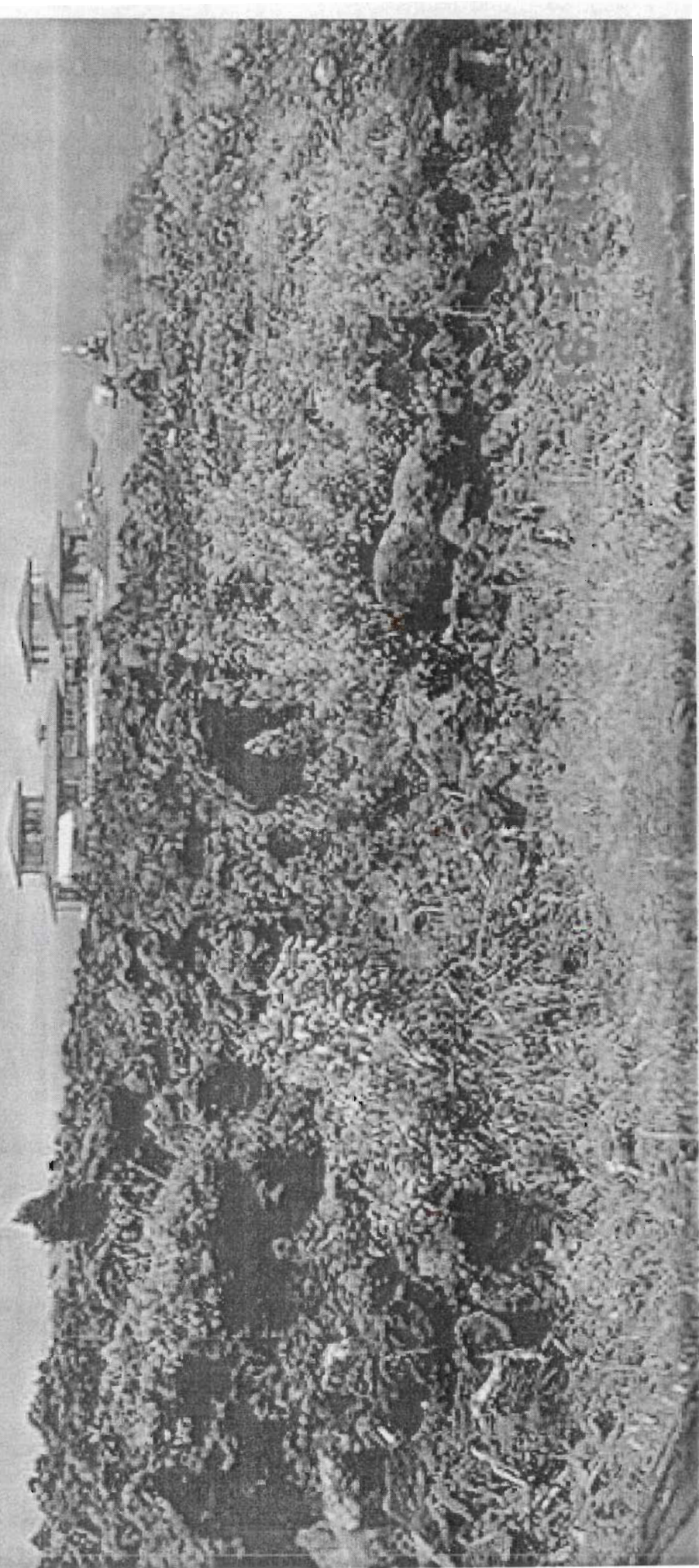
Witherington, BE & Martin, RE (2000). *Understanding, Assessing, and Resolving Problems on Sea Turtle Nesting Beaches*, 2nd ed., rev. Florida Marine Research Technical Report TR-2. 73pp.

Cc: Jeff Walters, HIHWNMS
Kimberly Mills, OCCL

7 12:43 PM

EXHIBIT 30

EXHIBIT 31



RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

Memorandum

2005 MAY 23 A 8:08

To: Melanie Chinen, Administrator
State Historic Preservation Division
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Doc No:0504kl04

From: Keola Lindsey, Burial Sites Program
State Historic Preservation Division

**RE: Conservation District Use Application (CDUA) No. Ha-3002
Kaalaliki and Hokukano Ahupua'a, Ka'u District, Hawai'i Island
TMK (3) 9-5-16: 36**

Background

This memorandum is in response to concerns that a single family residence has been constructed on a Native Hawaiian Cemetery on the above mentioned parcel, which is located in the Conservation District.

Archaeological Record:

Bishop Museum site record for Site Ha-B11-95 dated June 1962. Describes site as:

"19 burials with possibility of more. Some with 1,2, or 3 edges built up; center of some collapsed; others in good condition."

"Archaeological Burial Record" University of Hawai'i-Hilo Campus, undated but most likely after 1962. Punalu'u-Honuapo Archaeological Survey. Site recorded by Violet Hansen, and the information apparently provided to UH Hilo. Describes site as:

"On top, at edge of lava flow and approximately within a 500 foot square are 19 burials with a possibility of more. Sizes range from 6' x 8' to 10' x 12', height varies from 2' to 6'. Some that are on the very edge have 1,2, or 3 sides built up, centers of some have collapsed, others in good condition." [seems to use the earlier Bishop Museum site description for the most part].

Statewide Inventory of Historic Places 1973-1974. Supplementary feature description form identifies features as Site 10-24-4375 and describes:

"This burial complex lies on Arthur Ulrich lands, and since he refused permission for us to enter, this write-up is based on previously existing data, with no field check...It is difficult to assign any significance to this complex other than that attributed to a recognized burial area, because we didn't actually get to field check these sites. However, they should rate a reserve classification."

EXHIBIT 32

Review of CDUA History on file in the SHPD-Hawai'i Island Office

There have been two CDUA's related to this parcel- one in 1978, the second in 2001.

A July 7, 1978 DLNR-Division of Forestry Memorandum comments on CDUA HA/6/2/78- 1065 and reports that the former landowner (Arthur Ulrich) of the subject parcel:

"...graded the house site and planned reservoir...The land is zoned conservation and work was done without a CDUA permit."

It goes on to report:

The proposed house site is in the middle of an ancient cemetery. Work may have destroyed some graves and exposed what appears to be human bones from one grave site. Damage has been done to other graves by bulldozer work.

There are numerous grave sites along the edge and embankments of the a'a flow which will be fronting his proposed residence."

And it concludes:

"Recommend disapproval of CDUA until a historic survey is conducted, and an environmental assessment be made. Since a conservation district violation has apparently been committed, a CDUA violation report will be filed."

Photographs are included with this memorandum, and appear to confirm the house pad and access road already graded in 1978.

It appears that the alleged destruction and/or disturbance of graves on the subject property was never addressed in 1978 by way of investigation and prosecution, and it remains unclear what laws and enforcement entity were in place at the time to do so.

A November 3, 2000 DLNR letter (Hibbard to Lim) are the only SHPD comments on file in the Hawai'i Island Office on a proposed single family residence on the subject parcel. Parcel is now owned by the Carrolls. The letter states:

"...It is our understanding that your client wishes to build a single family residence in the parcel on a previously graded house pad...The access road and pad, which are located on the leading edge of an a'a flow, have been graded in the past..."

There are known significant archaeological sites located in the parcel. These include the government beach trail running along the coast, platforms and mounds adjacent to the trail, and habitation sites near Kawa springs located just north of the parcel along the

shoreline. Before approving any additional land altering activity in the parcel, we would recommend an archaeological inventory survey of the parcel.

We believe a house could be constructed on the existing house pad on the condition that there is no additional grading work conducted off the existing pad and access road. If your client agrees to the above condition, then the proposed action will have "no effect" on significant historic sites. In the future, if the parcel is developed, an archaeological inventory survey would be requested by our office prior to any permit approvals..."

It appears based on this letter that the SHPD concurred with the proposed construction of an SFR on the condition that the house would be within the previously graded (in 1977) house pad, and that there was no additional land alteration on the subject parcel. The issue of destroyed burials is never addressed in this letter.

CDUA No. HA-3002B (2001 page 4) reports that:

"Prior to making application around 1978, the previous landowner graded the proposed house site and access road at the a'a lava outcrop without authorization. In 1977, according to the County of Hawai'i, Historic Site No. 4375, consisting of approximately nineteen burial sites, which was nominated to the Hawai'i Register of Historical Places, was destroyed."

Page 7 states:

"Staff conferred with Historic Preservation staff in this matter and does understand that grading in the late 1970's destroyed the burials at the subject location. The recent site visit by and letter from Historic Preservation Division indicates that work may proceed. Staff understands that burial remains may exist adjacent to proposed construction sites areas, but are not likely to be impacted by the construction."

It remains unclear what background information on the alleged destruction of a cemetery was available to SHPD staff in 2000, and why the issue was not addressed at the time. The BLNR issued CDUP HA-3002 as amended on February 23, 2001.

SHPD Site Inspection October 13, 2004

Current SHPD staff were informed of Ka'u Community concerns regarding burials on this parcel in May of 2004. A site inspection was conducted to assess the condition of burials adjacent to the current landowner's project area, and to discuss concerns that the site grading may have exceeded the CDUP approved area.

There are archaeological features in close proximity to the Carroll residence both on their property and on the adjacent State property. These features have never been formally recorded (by an archaeological inventory survey in compliance with our current statutes and administrative rules), and thus, there are no short or long term plans that provide protection for the sites in place.

It could not be determined if the current landowners have violated the conditions of their CDUP, and the landowners denied grading outside the approved area.

A layer of base course has been placed over the original graded area, and examination of this area for displaced and/or in-situ human remains was impossible.

Conclusion

It remains unclear if the OCCL has determined whether or not the CDUP has been violated. If no violation of the CDUP has occurred, and if the CDUA process which incorporated SHPD's comments on the issue is valid, it does not appear the current landowners have violated any Historic Preservation Rules or Statutes.

Based on the archaeological records available, it does appear that archaeological sites presumed to be burials were either destroyed, disturbed and/or altered by unauthorized grading in 1977. It appears the former landowner is responsible for this alleged activity. It remains unclear what legal authority the State of Hawai'i currently has to investigate and prosecute the former landowner for these activities that took place 27 years ago.

It remains unclear what authority the State of Hawai'i has to conduct archaeological investigations within the area that was previously graded in 1977, and is currently under base course and the Carrol residence. The goal of these investigations would be to determine the presence or absence of disturbed or in-situ human remains.

If this does end up in litigation, the archaeological record identifying the burials would come into question, as it appears the sites were identified as burials based on construction style as opposed to the actual identification of in-situ human remains present within the sites.

It remains unclear if there is oral testimony within the Ka'u Community or information within the historical record that would specifically identify the sites as burials.

Archaeological testing of features in close proximity (on the a'a flow) to the project area may support the original interpretation of the site as a cemetery.



PLANNING DEPARTMENT
SURVEY DIVISION

25 AUPUNI STREET • HILO, HAWAII 96720 G.S.

HERBERT T. MATAYOSHI
Mayor

SIDNEY M. FUKU
Director

DUANE KANUHA
Deputy Director

COUNTY OF
HAWAII

JUL 14 8 14 AM '77

CERTIFIED MAIL

July 12, 1977

Mr. Arthur H. Ulrich
P.O. Box 35
Volcano, HI 96785

Dear Mr. Ulrich:

GRADING AND EXCAVATION ACTIVITIES
TMK: 9-5-16:36 and Por. 03

Upon receipt of a complaint, my staff conducted an on-site inspection of the above-referenced properties on June 24 and observed the following:

1. A newly graded access road to the shoreline from the Hawaii Belt Road of approximately twenty (20) feet width;
2. the depositing of red cinders onto the access road by a dump truck,
3. the sounds of a bulldozer further seaward.

In a discussion with my staff, you stated that you received permission from Messrs. Kazutaka Saiki, State Land Surveyor, and Wayne Subica, Soil Conservation Service Technician, to proceed with the aforementioned activities. You also stated that a land exchange had taken place between the State and yourself.

During this discussion, my staff pointed out that your property is located within the Special Management Area and that no "development" can occur within this area without the Planning Commission's approval.

Further staff investigation verified that a land exchange between you and the State of Hawaii had been executed on July 13, 1976, and that the Soil Conservation Service had approved your project.

In speaking with Mr. Mike Shimabukuro of the Department of Land and Natural Resources, Land Management Division, it was revealed that authorization for bulldozing and excavating was not granted by their office.

EXHIBIT 33

On July 1, 1977, our staff conducted another on-site inspection of the subject properties and found the following:

1. A roadway, covered with red cinder and running in a mauka-makai direction, had been constructed from the Hawaii Belt Road to the government beach trail. The subject roadway was approximately twenty (20) feet wide and fourteen hundred (1400) feet in length.
2. Another roadway, running approximately parallel to the government beach trail, had been constructed from the intersection of the mauka-makai roadway and the government beach trail from the south property line to the northernmost property line, approximately fifteen (15) feet wide and thirty-two hundred (3200) feet in length and intersecting with the existing government beach trail in at least three places.
3. A third roadway, partially covered with red cinder and running approximately parallel to the Hawaii Belt Road, had been constructed along the westernmost property line, approximately twenty (20) feet wide and one thousand (1000) feet in length.
4. An area of approximately 150 feet by 200 feet immediately adjacent and seaward of the third roadway had been leveled, and a reservoir, approximately 60 feet by 80 feet by 8 feet deep, had been constructed on the southern side of the bulldozed area.
5. A historic site (No. 4375) had been destroyed during clearing and construction of the reservoir.
6. Access onto the government beach trail from the State land on the south side had been blocked with stones and boulders.

Further staff investigation of this matter revealed the following:

1. The subject properties are zoned Conservation by the State Land Use Commission. Any use that is to be established or any improvements made within this district requires a Conservation District Use Permit from the Board of Land and Natural Resources.
2. Historic site No. 4375 consists of approximately nineteen (19) burial sites and agricultural terraces and was nominated to the Hawaii Register of Historical Places.

Mr. Arthur H. Ulrich
Page 3

3. Upon verbally conferring with representatives of the Department of Public Works, we were informed that approval of your project by the Soil Conservation Service may not fully comply with the requirements of the County Grading Ordinance (Ordinance No. 168). Therefore, they have requested that you contact them regarding this matter.
4. As my staff verbally informed you on June 24, the subject properties are located within the County's Special Management Area (SMA), established pursuant to Rule 9.2 of the Planning Commission's Rule No. 9, Rules and Regulations Relating to Environmental Shoreline Protection. The work that was performed is defined as "development" under this rule, and Rule 9.10 further states that "No development or structure shall be initiated within the Special Management Area without first obtaining a permit pursuant to these Rules and Regulations."

Based on the above, we must regretfully inform you that an infraction of Rule No. 9, of the Planning Commission's Rules and Regulations, has been committed. As such, you are hereby notified that all work on the subject properties must immediately cease and desist, and that you must apply for a Special Management Area (SMA) Use Permit within fifteen (15) calendar days upon receipt of this letter.

Enclosed are the necessary application forms and a copy of Rule No. 9 for your convenience and information.

Please be advised that we have referred this matter to the other affected agencies and the Corporation Counsel for their review and appropriate action.

Should you have any questions, please do not hesitate to contact Francis Saiki of this department at 961-8288.

Thank you very much.

Sincerely,

Sidney Fuke
SIDNEY FUKE
Director

FS/DK:mmk
Enclosures

xc: Mayor's Office (Harry Ruddle)
Corporation Counsel
Department of Public Works
District Engineer (Charles Schuster)

No. 563191

PRICE ON	15¢	35¢	65¢	85¢	NO.	SENT	POSTMARK OR DATE	★ 60¢ 1978-0-300-450
RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)								AUG 4 1978 U.S. POSTAL SERVICE HAWAII
SENT TO Mr. Arthur H. Ulrich								
STREET AND NO. P. O. Box 35								
P.O., STATE AND ZIP CODE Volcano, Hawaii 96785								
OPTIONAL SERVICES FOR ADDITIONAL FEES								
RETURN RECEIPT SERVICES	1. Shows to whom and date delivered 15¢ With delivery to addressee only 65¢ 2. Shows to whom, date and where delivered 35¢ With delivery to addressee only 85¢							
DELIVER TO ADDRESSEE ONLY 50¢								
SPECIAL DELIVERY (extra fee required) 50¢								
PS Form 3800 NO INSURANCE COVERAGE PROVIDED (See other side) H-78-12 NOT FOR INTERNATIONAL MAIL GPO: 1978 O								

mya

A-1065
-1054

November 24, 1978

REF. NO.: HA-6/2/78-1065

Mr. Arthur H. Ulrich
P. O. Box 35
Volcano, HI 96785

Dear Mr. Ulrich:

Conservation District Use Application
for Single Family Dwelling and
Stock Grazing Use at Kau, Hawaii

We regret to inform you that the Board of Land and Natural Resources at its meeting of November 22, 1978, under agenda Item H-4, denied, without prejudice, your above noted application, on the basis that:

The SMA clearances from the County of Hawaii, pursuant to the provisions of Chapter 205A-29 (d), Hawaii Revised Statutes, have not been executed.

In the event that the County denies the SMA permit, the applicant shall restore the area to its previous undisturbed condition. Should the County approve the SMA, the applicant shall resubmit the SMA with the CDA for action.

Should you have any questions, please contact our Planning Office at 548-7837.

Very truly yours,



W. Y. THOMPSON
Chairman of the Board

cc: Hawaii Board Member
Hawaii Land Agent
U. S. Fish and Wildlife
Department of Health
Department of Agriculture
COH - Planning
COH - Water Supply
COH - Public Works

bcc: Land Management
DOWALD
Fish & Game
Forestry
State Parks
Historic Sites
NARS

R
RCE:VW

EXHIBIT 34

RECORDATION REQUESTED BY:

DEPT. OF LAND AND NATURAL RESOURCES
LAND MANAGEMENT DIVISION

AFTER RECORDATION, RETURN TO:

DEPT. OF LAND AND NATURAL RESOURCES
LAND MANAGEMENT DIVISION

RETURN BY: MAIL () PICKUP (X)

STATE OF HAWAII
BUREAU OF LAND MANAGEMENT
RECEIVED FOR RECORD

LIBER 11531 PG 75
1978 JUL 13 PM 2:21

Chastanmann
RECORDED

76- 55538

EXCHANGE DEED
and
AGREEMENT FOR EXCHANGE

THIS INDENTURE, made and entered into this *8th*
day of *December*, 19*75*, by and between the STATE OF
HAWAII, by its Board of Land and Natural Resources, herein-
after referred to as the "GRANTEE" and ARTHUR H. ULRICH,
husband of Eula L. Ulrich, whose residence is Volcano, *ELH my n.f.*
Hawaii and whose post office address is P. O. Box 35, Volcano,
Hawaii 96785 respectively, hereinafter referred to as the
"GRANTOR",

W I T N E S S E T H:

WHEREAS, the Grantor is the owner of Parcel 2,
situate at Hokukano and Kaalaiki, Ka'u, Island of Hawaii,
Hawaii, hereinafter more particularly described, which
the Grantee desires to acquire for a public purpose, namely,
the Redesignation of Access to Hawaii Belt Road, Punaluu,
Ka'u, Hawaii; and

WHEREAS, the Grantee is the owner of Parcel 1,
situate at Hokukano and Kaalaiki aforesaid, hereinafter
more particularly described, which the Grantor is willing
to accept in exchange for the parcel first above-mentioned;
and

EXHIBIT 35

WHEREAS, the land of the Grantee has an appraised value of ONE THOUSAND FOUR HUNDRED TWENTY-SEVEN AND NO/100 DOLLARS (\$1,427.00), and the land of the Grantor has an appraised value of ONE THOUSAND FOUR HUNDRED TWENTY-SEVEN AND NO/100 DOLLARS (\$1,427.00); and

WHEREAS, the public land to be exchanged is of use comparable to that of the land owned by the Grantor;

NOW, THEREFORE, the Grantor in consideration of the covenant of the Grantee as hereinafter set forth and the conveyance of Parcel 2 to the Grantee, does hereby grant to said Grantee, its successors and assigns, absolutely and in fee simple, that certain parcel of land situate at Hokukano, Ka'u , more particularly described in Exhibit "A" and delineated on Exhibit "B", both of which are attached hereto and made a part hereof, said exhibits being, respectively, a survey description and survey map prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, both being designated C.S. F. No. 17,501 and dated July 7, 1975.

TO HAVE AND TO HOLD the same, together with all the rights, easements, privileges tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining or held and enjoyed therewith, unto said Grantee, its successors and assigns, forever.

AND said Grantor, his heirs and assigns, covenants that he is lawfully seized of the granted parcel in fee simple, and that he has good right to grant and convey the same as aforesaid; that the same is free and clear of all

encumbrances and that he will and his heirs and assigns shall WARRANT AND DEFEND the same unto said Grantee, its successors and assigns, forever, against the lawful claims and demands of all persons whomsoever.

AND EUELA L. ULRICH, wife of Arthur H. Ulrich, *Ed H. Ulrich, H.S.* for the consideration aforesaid, does by the presents release, remise and forever quitclaim unto said Grantee, its successors and assigns, all of her estate, right, title and interest of whatsoever kind or nature and howsoever acquired, whether by way of dower, community property or otherwise, in and to the above described property and every part thereof.

AND the Grantee, in consideration of the conveyance to it of the foregoing described parcel of land, does hereby covenant that it will convey to the Grantor, his heirs and assigns, by a separate instrument in the nature and form of a Land Patent, subject to mineral and water reservations and covenant on discrimination, Parcel 1, situate at Hokukano, Ka'u, Hawaii, more particularly described in Exhibit "C" and delineated on Exhibit "D", both of which are attached hereto and made a part hereof, said exhibits being, respectively, a survey description and survey map prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, both being designated C.S.F. No. 17,500 and dated July 7, 1975.

This exchange of lands shall be subject to disapproval by the legislature by two-thirds vote of either the

Senate or the House of Representatives or by majority vote of both, in any regular or special session next following the date of such disposition.

IN WITNESS WHEREOF, the STATE OF HAWAII, the Grantee herein, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be duly executed this 1st day of June, 1976, and ARTHUR H. ULRICH and EUELA L. ULRICH, have caused these presents to be executed this 8th day of December, 1975, both effective as of the day and year first above written.

STATE OF HAWAII

By C. Cobb
Chairman and Member
Board of Land and
Natural Resources

And By David Munro
Member
Board of Land and
Natural Resources

Arthur H. Ulrich
ARTHUR H. ULRICH

Euela L. Ulrich
EUELA L. ULRICH

APPROVED AS TO FORM
AND LEGALITY:

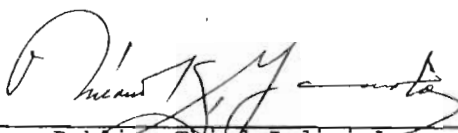
Deputy Attorney General
Deputy Attorney General
Dated: November 17, 1975

STATE OF HAWAII
COUNTY OF HAWAII

)
: SS.
)

LIBER 11531 PG 79

On this 8th day of December, 1975,
before me personally appeared ARTHUR H. ULRICH and EUELA L. ULICH, H.P.
ULRICH, to me known to be the persons described in and who
executed the foregoing instrument and acknowledged that they
executed the same as their free act and deed.



Notary Public, Third Judicial
Circuit, State of Hawaii

My commission expires: Sept. 13, 1979

mm



LIBER 11531 PC 80

STATE OF HAWAII

SURVEY DIVISION

DEPT. OF ACCOUNTING AND GENERAL SERVICES

HONOLULU

C.S.F. No. 17,501

July 7, 1975

LAND EXCHANGE

ROAD RIGHT-OF-WAY

PARCEL 2

Kaalaiki, Ka'u, Island of Hawaii, Hawaii

Being a portion of Grant 2370 to Noa Malailua.

Beginning at the northwest corner of this parcel of land, on the northeasterly boundary of the Government Land of Hokuano, and on the south-east side of Mamalahoa Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "HILL" being 13,092.71 feet South and 8094.10 feet West, thence running by azimuths measured clockwise from True South:-

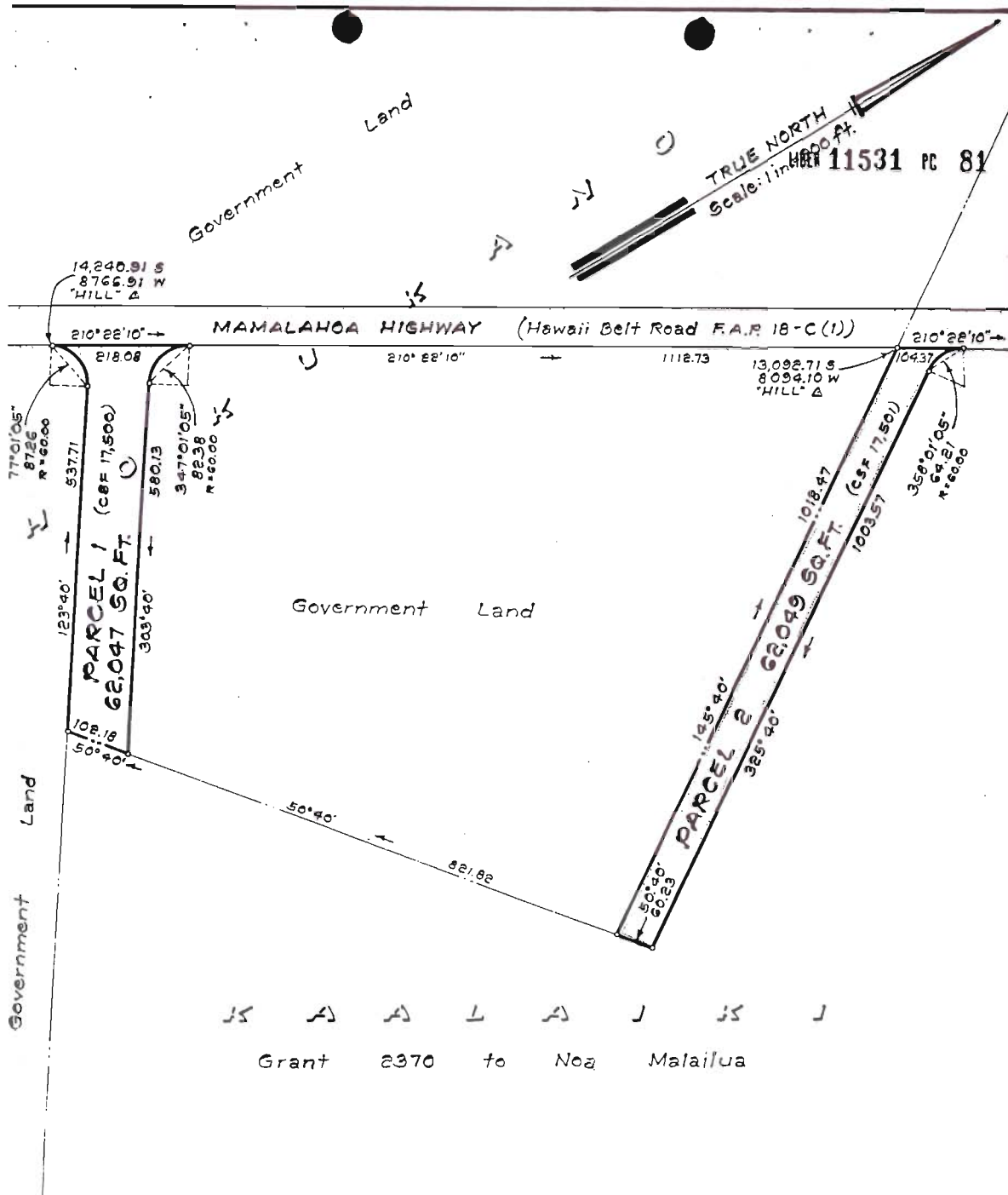
1. 210° 22' 10" 104.37 feet along the southeast side of Mamalahoa Highway;
2. Thence along the remainder of Grant 2370 to Noa Malailua on a curve to the left with a radius of 60.00 feet, the chord azimuth and distance being: 358° 01' 05" 64.21 feet;
3. 325° 40' 1003.57 feet along the remainder of Grant 2370 to Noa Malailua;
4. 50° 40' 60.23 feet along the remainder of Grant 2370 to Noa Malailua;
5. 145° 40' 1018.47 feet along Government Land to the point of beginning and containing an AREA OF 62,049 SQUARE FEET.

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

Compiled from map by
John W. Smith, HSS
Plat 124 and other
Gov't. Survey Records.

By: Ichiro Sakamoto
Ichiro Sakamoto
Land Surveyor cm

EXHIBIT "A"



LAND EXCHANGE
 ROAD RIGHT-OF-WAYS
 PARCELS 1 AND 2
 Hokukano and Kaalaiki, Ka'u, Island of Hawaii, Hawaii
 Scale: 1 inch = 200 feet

EXHIBIT "B"

JOB H-7280
 C. BK

TAX MAP 9-5-16

SURVEY DIVISION
 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

C. S. F. No. 17,500-17,501

STATE OF HAWAII

R.K. July 7, 1975



LIBER 11531 PG 82

STATE OF HAWAII

SURVEY DIVISION

DEPT. OF ACCOUNTING AND GENERAL SERVICES

HONOLULU

No. 17,500

July 7, 1975

LAND EXCHANGE

ROAD RIGHT-OF-WAY

PARCEL 1

Hokukano, Ka'u, Island of Hawaii, Hawaii

Being a portion of the Government Land of Hokukano.

Beginning at the west corner of this parcel of land, and on the southeast side of Mamalahoa Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "HILL" being 14,240.91 feet South and 8766.91 feet West, thence running by azimuths measured clockwise from True South:-

1. 210° 22' 10" 218.08 feet along the southeast side of Mamalahoa Highway;
2. Thence along Government Land on a curve to the left with a radius of 60.00 feet, the chord azimuth and distance being:
347° 01' 05" 82.38 feet;
3. 303° 40' 580.13 feet along Government Land;
4. 50° 40' 102.18 feet along Grant 2370 to Noa Malailua;
5. 123° 40' 537.71 feet along Government Land;
6. Thence along Government Land on a curve to the left with a radius of 60.00 feet, the chord azimuth and distance being:
77° 01' 05" 87.26 feet to the point of beginning and containing an AREA OF 62,047 SQUARE FEET.

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

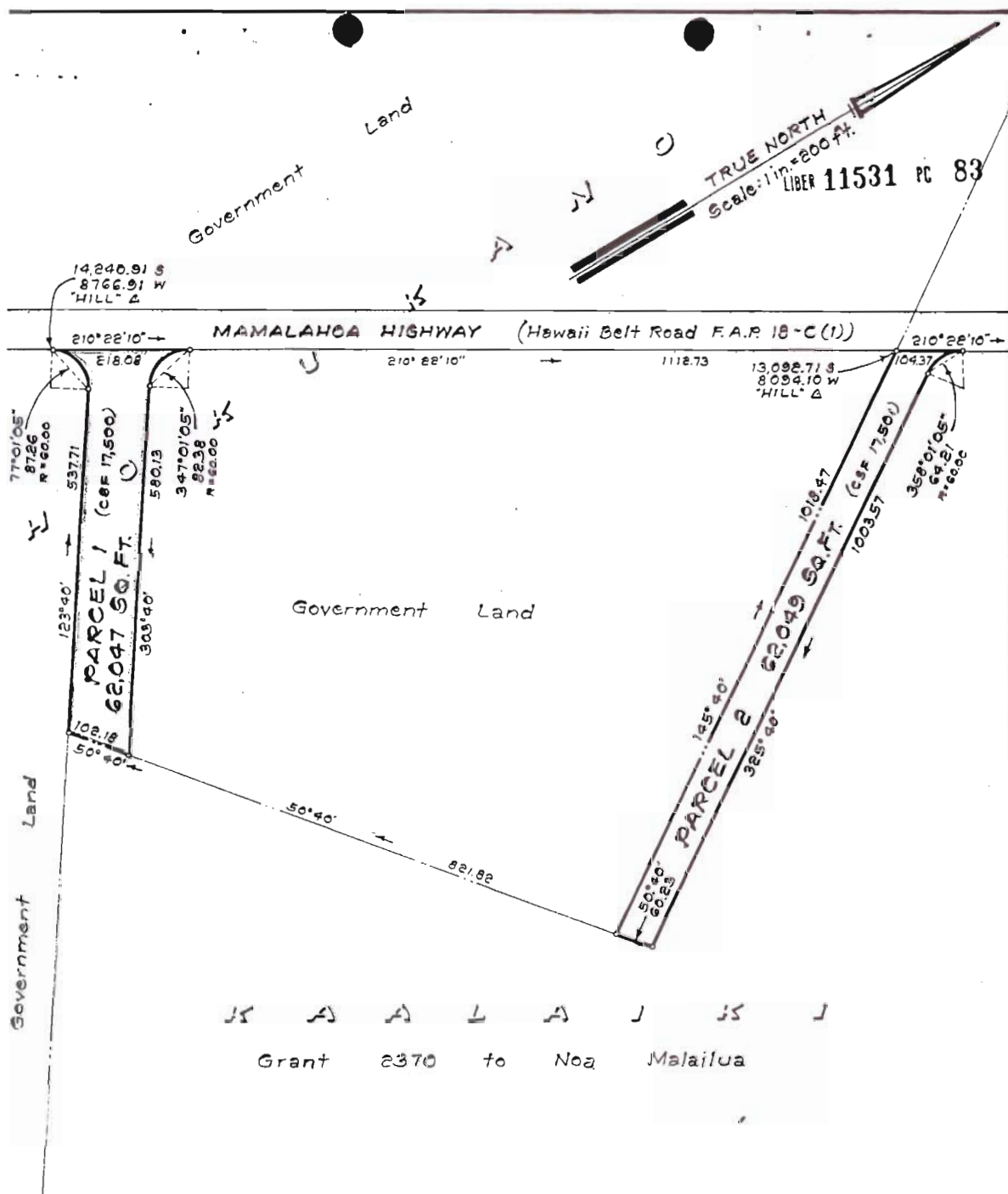
Compiled from map by
John N. Smith, RSS
Plat 124 and other
Gov't. Survey Records.

By:

Ichiro Sakamoto
Ichiro Sakamoto
Land Surveyor

cm

EXHIBIT #4C12



LAND EXCHANGE
ROAD RIGHT-OF-WAYS
PARCELS 1 AND 2
Hokukano and Kasalaiki, Ka'u, Island of Hawaii, Hawaii
Scale: 1 inch = 200 feet

EXHIBIT "D"

JOB H-7280
C. BK

TAX MAP 9-5-16

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND SERVICES

C. S. F. NO. 17,500-17,501

STATE OF HAWAII

R.K. July 7, 1975

Harry Kim
Mayor



Christopher J. Yuen
Director

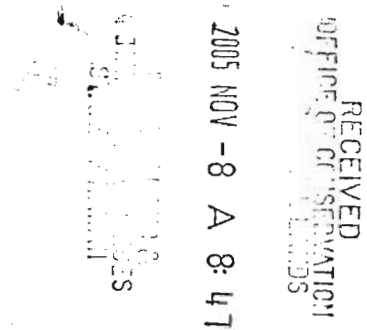
Roy R. Takemoto
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043
(808) 961-8288 • Fax (808) 961-8742

November 1, 2005

Mr. Samuel J. Lemmo
Administrator
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
P.O. Box 621
Honolulu, Hawaii 96809



Dear Mr. Lemmo:

**Subject: Carroll Single Family Residence CDUP HA-3002
Public Shoreline Access**

Tax Map Key: (3) 9-5-016:036 Hokuano, Ka'u, Island of Hawai'i

As you may know, Special Management Area Use Permit No. 79 (SMA 79), which was approved by the County of Hawaii's Planning Commission on November 29, 1978 affecting the subject property, was subsequently nullified by the Planning Commission on December 3, 1981.

SMA 79 allowed for road grading, construction of a water reservoir, fence, ranch quarters building, a windmill, digging a water well, installation of a waterline and electric service poles, leveling of approximately 12 acres of land, and landscaping. Some of the above activities were actually conducted prior to the previous landowner's application for a SMA Use Permit, including much of the road grading, miscellaneous grading activities, and construction of the reservoir.

Condition No. 2 of SMA 79 required *"(t)hat public access to the shoreline shall be provided along the petitioner's access road from the Hawaii Belt Road. The exact terms of the public access, e.g., width, improvements and liability, shall use as a reference Chapter 46-6.5, Hawaii Revised Statutes, relating to public access. They shall be determined by the County through the Planning Director prior to the granting of final subdivision approval for the access road from*
Hawai'i County is an equal opportunity provider and employer.

EXHIBIT 37

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

File No.:OA-06-12

January 13, 2006

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Enforcement File No. OA-06-12
Regarding Alleged Unauthorized Placement and Storage of Two
Containers and Signage on State of Hawaii Encumbered Lands (1) 3-
8-001:073 and 001

BY: Garrett Saikley, P.O. Box 240969, Honolulu, Hawaii, 96824,
TMK: (1) 3-8-001:069

LAND OWNERSHIP: State of Hawaii, Department of Land and Natural Resources, Land
Division, P.O. Box 621, Honolulu, Hawaii 96809

TMK: (1) 3-8-001: 001

AREA OF PARCEL: TMK: 001 = Approximately 2.211 Acres

AREA OF USE: Approximately 240 Square Feet

LOCATION: Kuliouou, Hawaii

SUBZONE: Protective

DESCRIPTION OF AREA:

The subject parcel TMK: (1) 3-8-001: 001 is located in the Kuliouou District, Island of Oahu, and owned by the State of Hawaii, Department of Land and Natural Resources (DLNR). Subject parcels TMK's: 073, and 001¹ and TMK's (1) 3-8-001:071, 070, 067, 072, and 073 all comprise the Division of Forestry and Wildlife's (DOFAW) Paiko Lagoon Wildlife Sanctuary area, under

¹ TMK: 001 consists of an easement and beach area, that has narrowed due to erosion.

Executive Order 4105 (4/6/2005)². Subject parcels TMK: 071, 070, 067 abut Paiko Lagoon, and subject parcels TMK's: 072, and 073 abut the ocean. Access to the area is from an easement, which joins to Paiko Drive, which turns onto Kalanianaʻole Highway (**Exhibits 1, 2 & 3**).

ALLEGED UNAUTHORIZED LAND USES:

The Office of Conservation and Coastal Lands (OCCL) received a complaint from the DOFAW regarding the unauthorized placement and storage of two large containers, and a complaint regarding large amounts of dirt dumped in and around subject parcel TMK: 001 by Garrett Saikley, the landowner of the adjacent subject parcel TMK: (1) 3-8-001:069.

DOFAW staff had in the past, talked to Mr. Saikley's representative about dumping materials (sand, soil, etc.) on the State-owned subject parcel. However, photos taken by DOFAW staff indicate that soil dumping, and the placement of unauthorized signage took place.

On August 8, 2005, OCCL, DOFAW, and the Division of Conservation and Resources (DOCARE) Enforcement staff conducted a site inspection of subject parcel TMK: 001 and 073. Two large containers, covering approximately 240 square feet, were located on subject parcel TMK: 001. In addition, staff noted tree debris pushed over the bank toward the beach. Landscaping consisted of water sprinklers and bougainvillea shrubs. Lastly, a set of racks was also placed in the area, outside of Mr. Saikley's chain link fence (**Exhibit 4**).

Staff notes after checking with the State Land Use Commission (LUC), it was determined that subject parcel TMK: (1) 3-8-001: 073 was located in the Urban District. Therefore, the subject report deals with subject parcel TMK: (1) 3-8-001:001, on where Mr. Saikley conducted unauthorized uses and is Conservation District land.

The four alleged, unauthorized uses are: 1) signage; 2) placement of container structures; 3) tree debris; and 4) landscaping violation are the subject of the staff report.

REFERRAL OF ALLEGED VIOLATIONS TO THE LAND BOARD RATHER THAN THE HEARING OFFICER/ADMINISTRATIVE PENALTY SYSTEM (HOAPS):

The alleged violations have been referred to the Board of Land and Natural Resources rather than HOAPS because of the seriousness of the violations³.

² Prior to Executive Order 4105, the land was considered unencumbered state lands, under the jurisdiction of the Land Division.

³ HOAPS distinguishes between Level I and Level II violations, the former being the more serious category which is referred to the Board, and the latter, minor violations, referred to HOAPS.

RESOLUTION OF UNAUTHORIZED LAND USES:

Chapter 13-5, Hawaii Administrative Rules (HAR) and Chapter 183C, Hawaii Revised Statutes (HRS), regulate land uses in the Conservation District by identifying a list of uses that may be

allowed by Conservation District Use Permit (CDUP). The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained. HAR, Chapter 13-5 defines "land use" in part as: the placement or erection of any solid material on land or the grading, removing or dredging of any material or natural resource on land.

The four alleged, unauthorized uses are: 1) signage; 2) placement of two containers; 3) tree debris; and 4) and the landscaping violation are the subject of the staff report. This report and staff recommend conditions seek to resolve the subject Conservation District violation. Pursuant to HRS, Chapter 183C, the maximum fine for a conservation district violation is \$2,000 per violation in addition to administrative costs, costs associated with the land and/or habitat restoration, if required, and damages to state land. After written or verbal notification from the Department, willful violation of this section may incur an additional fine of up to \$2,000 per day per violation for each day the violation persists.

DISCUSSION:

Staff notes that Mr. Saikley, or his contractor, placed two containers in the area adjacent to his subject parcel. Staff notes was in the process of is demolishing his SFR and rebuilding it, and may have needed to use the containers to remove trash. However, DOFAW staff had asked Mr. Saikley or his contractor to remove the two dumpster containers located on Paiko Lagoon Wildlife Sanctuary lands, but to no avail.

On August 8, 2005, the OCCL issued a Cease and Desist to Mr. Saikley to cease further activity in the state owned lands (**Exhibit 5**). Mr. Saikley's new contractor, William Barber, later moved the containers to Mr. Saikley's subject parcel (**Exhibit 6**). Although, the containers were eventually removed, staff believed that Mr. Saikley should be fined for failing to heed the DOFAW's request, and because the containers were on Conservation District land without approval.

Staff recommends to the Board of Land and Natural Resources (Board) that Mr. Saikley, as the party whom authorized or could authorize the placement of the two containers, be fined \$2,000.00 for the unauthorized placement of the containers on land in the Paiko Lagoon Wildlife Sanctuary lands.

Staff notes that there was evidence of tree debris cut and pushed over the embankment that leads to the state owned portion of land, identified as subject parcel TMK: 001. Staff was not able to identify what trees the debris came from. However, the placement of the piles alongside the embankment suggests a physical barrier, or hardship to the public who have the right to access the parcel, which is part of the Paiko Lagoon Wildlife Sanctuary lands. Staff recommends to the Board that Mr. Saikley be fined \$500.00 dollars for the tree debris.

Staff notes the placement of the “No Trespassing” signs in the Conservation District require approval, for which none was given. Staff recommends to the Board that Mr. Saikley be fined \$250.00 dollars for the signs.

Staff notes a \$100 dollar fine will be asked for regarding the landscaping action of bougainvillea shrubs, and the irrigation located in place outside the metes and bounds of Mr. Saikley’s property. However, staff recommends to the Board that Mr. Saikley confirm with the Land Division whether he requires a disposition for the landscaping actions, and with the Division of Forestry and Wildlife regarding their concerns and comments regarding the sanctuary area.

Staff recommends to the Board that the landowner be fined \$2,850.00 for the unauthorized placement of the containers, signage, bougainvillea shrubs, and tree debris. Staff notes the landowner should pay \$500.00 for the OCCL's administrative costs; and \$250.00 for DOCARE administrative costs; total costs \$3,600.00. This submittal and notice of the Board's meeting will be sent to Mr. Saikley by certified mail to the address of record in Hawaii.

FINDINGS:

1. That Mr. Saikley did in fact authorize, cause, or allow four unauthorized violations to occur (signage; placement of two containers; tree debris; landscaping on the Paiko Lagoon Wildlife Sanctuary lands);
2. That the unauthorized land use is of a serious nature; and
3. That the unauthorized land use occurred within the State Land Use Conservation District, Protective subzone.

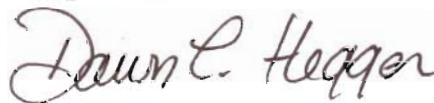
AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to Chapter 183C, Hawaii Revised Statutes (HRS), the Board of Land and Natural Resources find Mr. Saikley in violation of HRS, Chapter 183C and HAR, Chapter 13-5, and is subject to the following:

1. That Mr. Saikley violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in four instance by failing to obtain the appropriate approval for: 1) signage; 2) placement of two containers; 3) tree debris; and 4) and the landscaping. Mr. Saikley is fined \$2,850.00;
2. That Mr. Saikley is fined an additional \$750.00 for administrative costs associated with the subject violation;

3. That Mr. Saikley shall pay all fines (total **\$3,600.00**) within thirty (30) days of the date of the Board's action;
4. That in the event of failure of Mr. Saikley to comply with any order herein, they shall be fined an additional \$2,000 per day until the order is complied with;
5. That Mr. Saikley shall confirm with the Land Division whether he requires a disposition for the landscaping actions, and with the Division of Forestry and Wildlife regarding their concerns and comments regarding the sanctuary area;
6. That no further work shall occur on the subject parcels identified as the Paiko Lagoon Wildlife Sanctuary lands located within the Conservation District, without the Board of Land and Natural Resources approval; Chairman's approval and/or OCCL approval. If further work occurs in the Conservation District portions of the subject parcels without approval; Mr. Saikley will be fined an additional \$2,000 a day; and
7. That in the event of failure of Mr. Saikley to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.


Respectfully submitted,



Dawn T. Hegger, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:

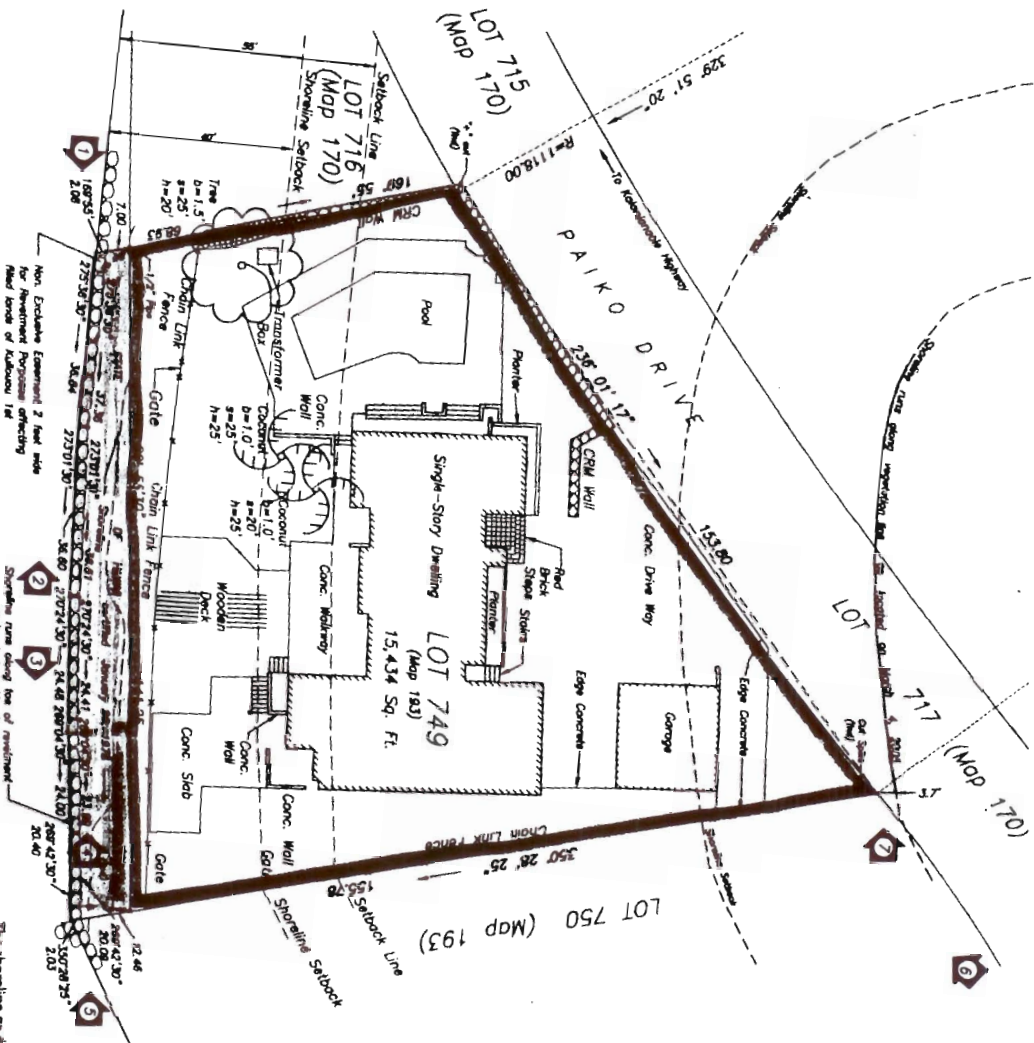


 PETER T. YOUNG, Chairperson
Department of Land and Natural Resources

[illegible]

EXHIBIT 1

SEA



The shoreline as delineated in red is hereby certified as the shoreline as of 1996.

[Signature]



Owner: F. Solley Trust
 Address: 101 Puhia Drive
 Kulaou 1st, Honolulu, Oahu

SHORELINE
 LOT 749
 Land Court Application 5
 At Kulaou 1st, Honolulu,

TRUE NORTH
 Scale: 1 in. = 20 ft.

EXHIBIT 3

1 1059

KULIYOUU PT. HONOLULU OAHU

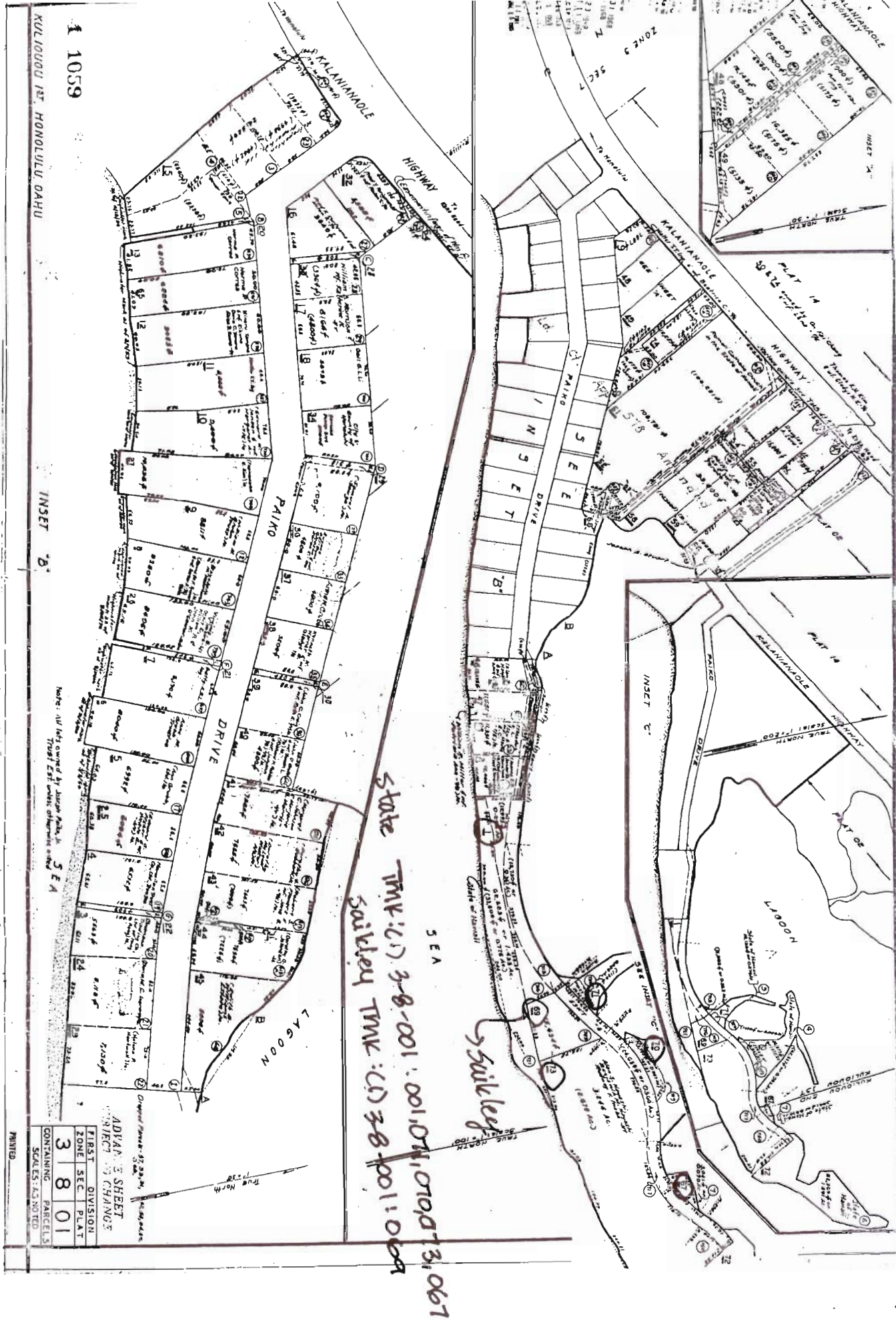
INSET "B"

Note: All lots owned by Joseph Paul, Jr. Trust. Est. under Chapter 663.

SEA

ADJACENT SHEET			
SUBJECT TO CHANGES			
FIRST DIVISION	ZONE	SEC	PLAT
3	8	01	
CONTAINING PARCELS			
SCALE: AS NOTED			

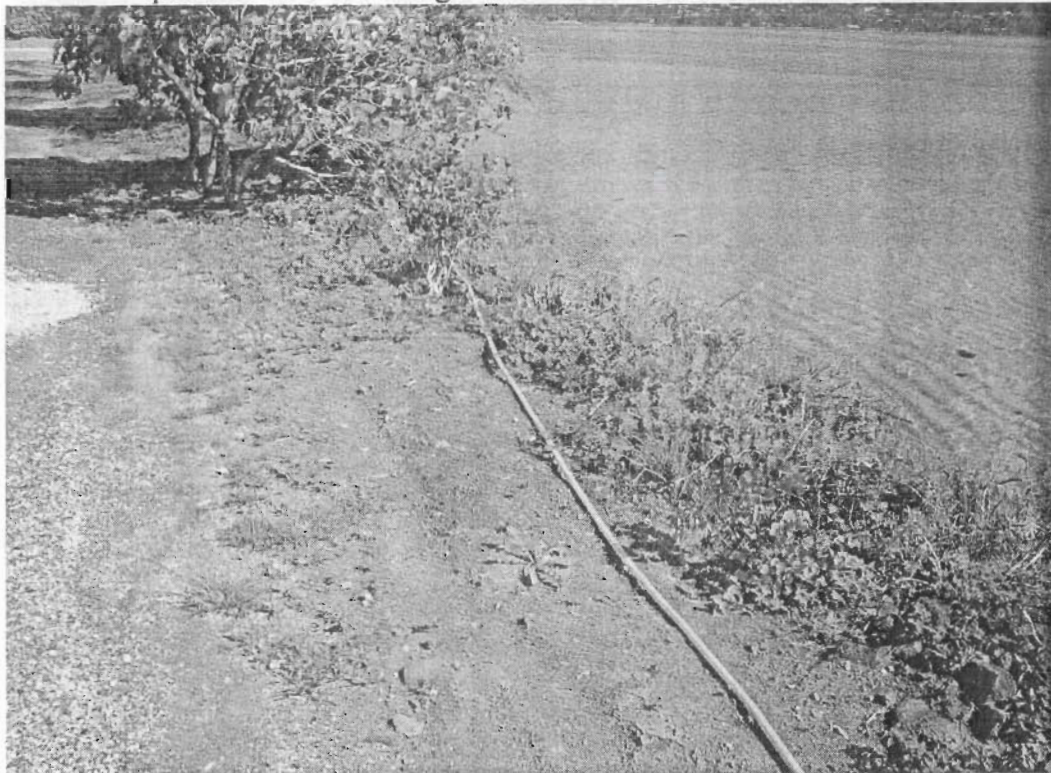
PAVED



Division of Forestry and Wildlife (DOFAW) photographs taken prior to Site Inspection by OCCL,
DOCARE on August 8, 2005



placement of dirt alongside shoreline on state-owned lands



placement of dirt, water hose, and bougainvillea



signage

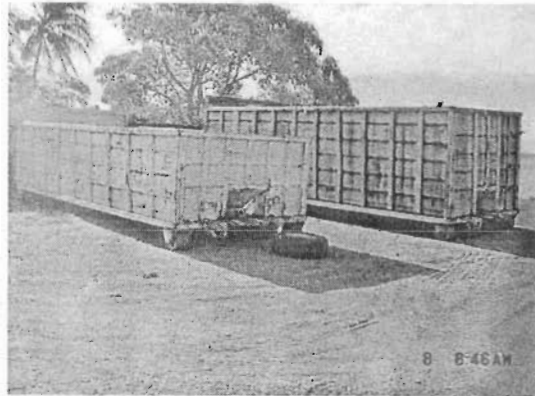


placement of dirt, water hose, and bougainvillea

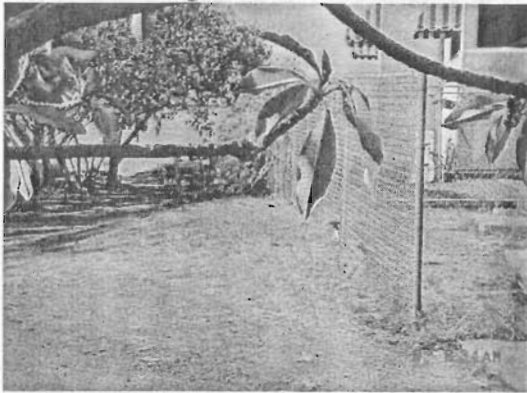
Site Inspection August 8, 2005 by OCCL, DOARE, DOFAW



clearing on state-owned land



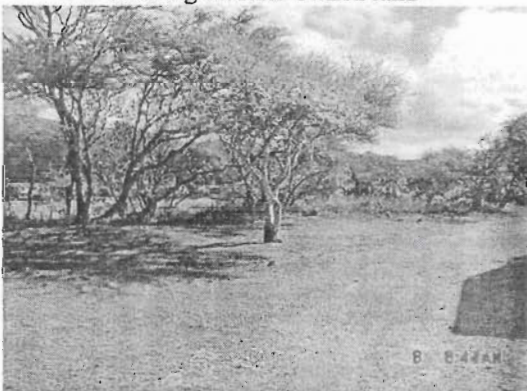
unauthorized containers on state-owned land



clearing on state-owned land



unauthorized tree debris



clearing on state-owned land in front of Saikley's driveway



unauthorized sprinkler use



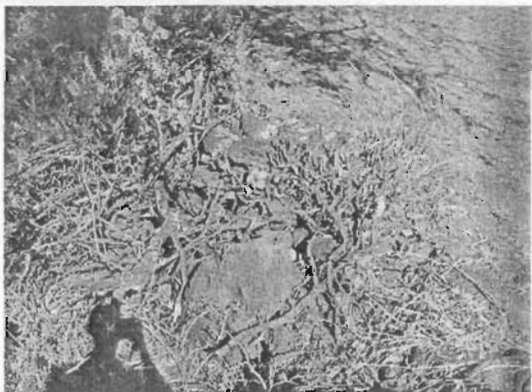
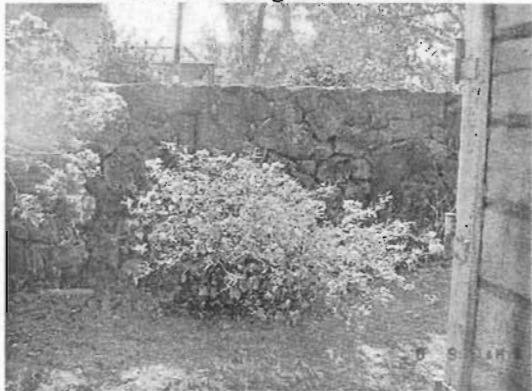
unauthorized sprinklers and bougainvillea



clearing of state owned land and rack placement



unauthorized bougainvillea shrubs

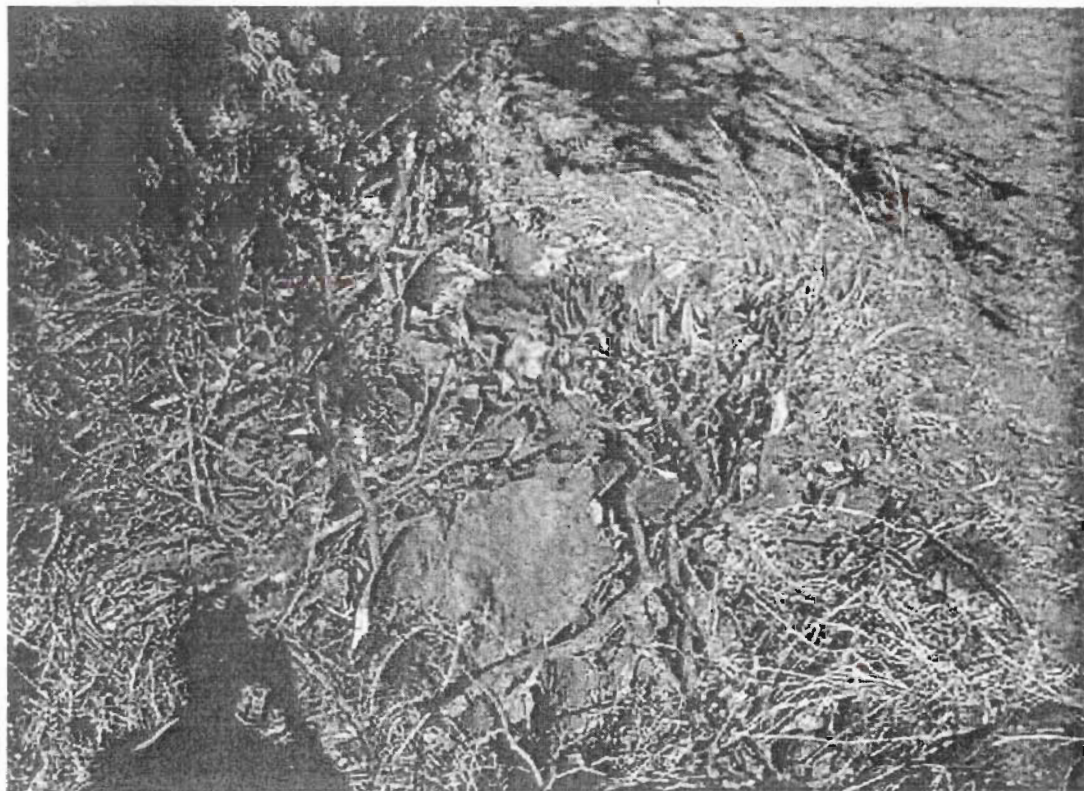
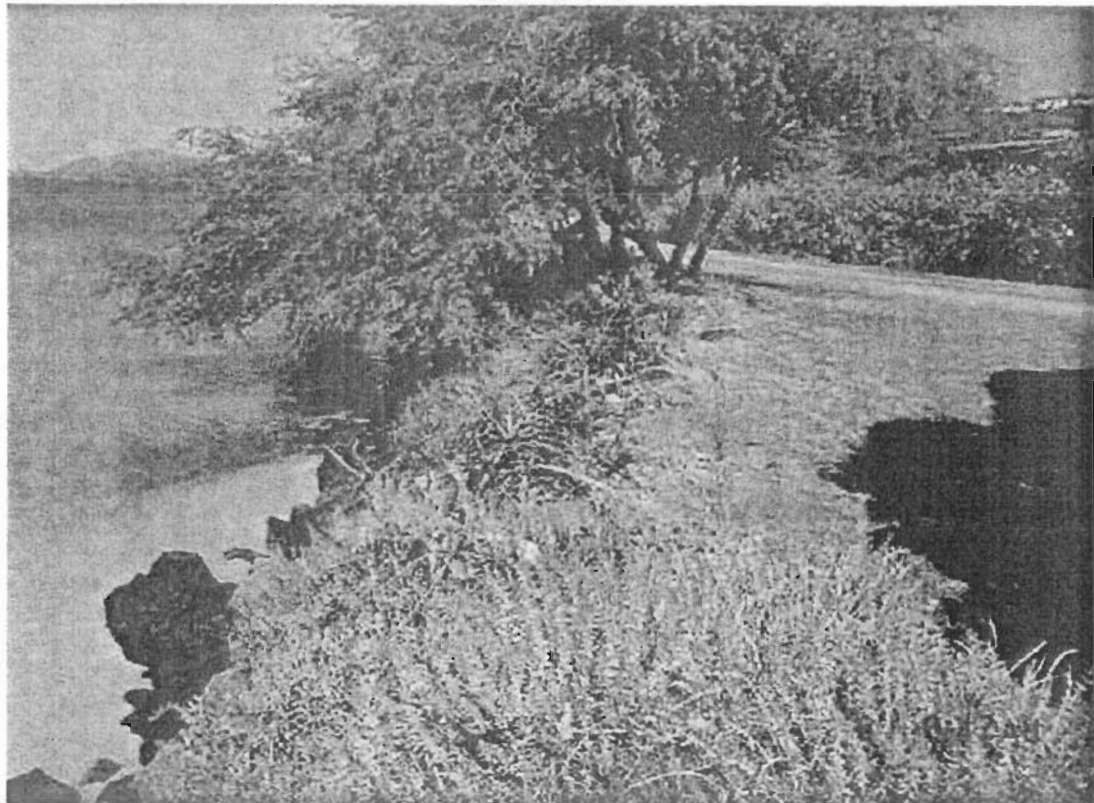


tree debris near shoreline



spread out mound of dirt on state-owned land

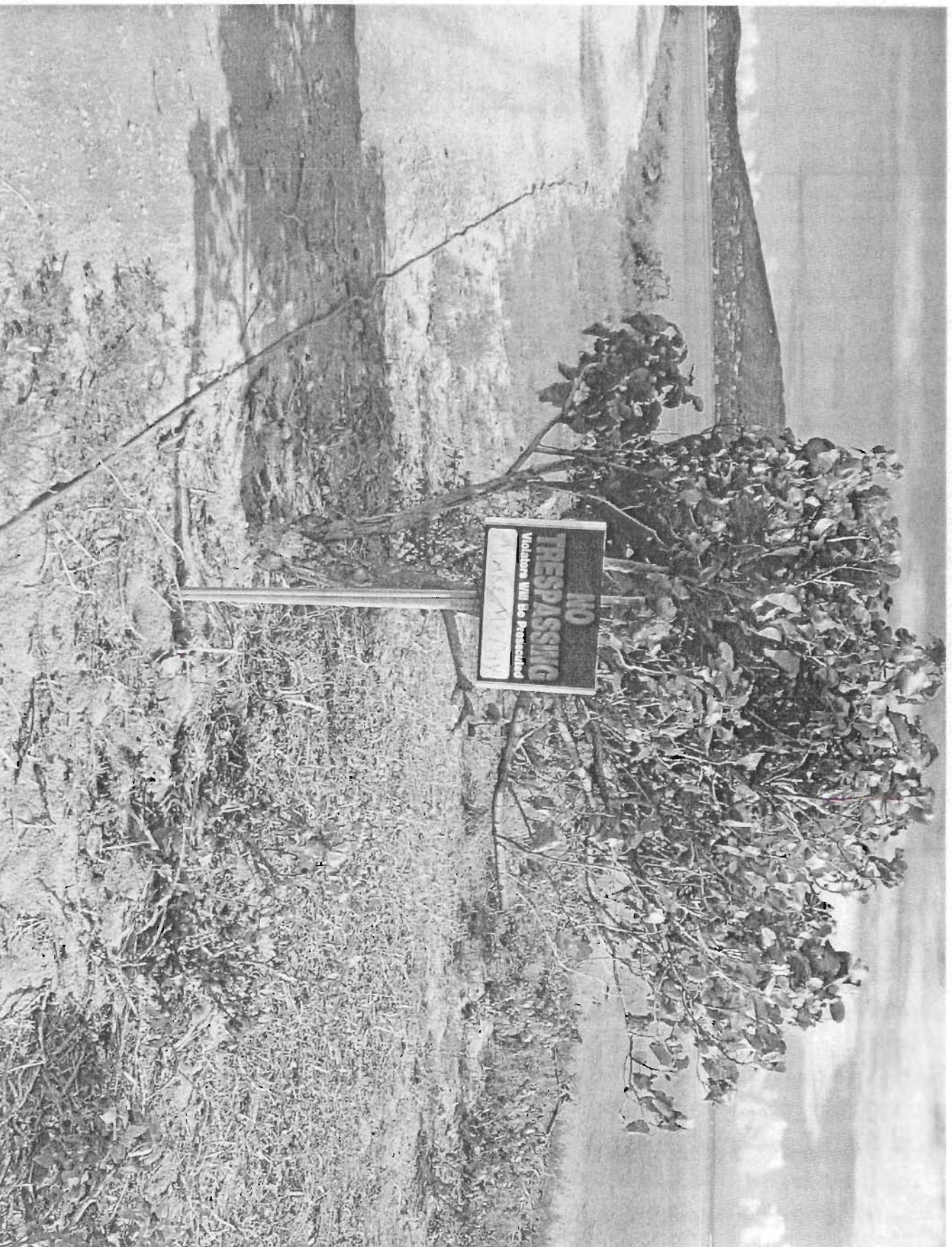
EXHIBIT 4



unauthorized tree debris pushed up alongside the shoreline on state-owned lands

EXHIBIT 4

Subject ranch with 11008-0000
* unauthorized signage placed on
state land located in
conservation district





ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

NOTICE AND ORDER

Enforcement Case: OA-06-12

August 8, 2005

Garrett Saikley
P.O. Box 90508
Honolulu, Hawaii 96835

Dear Mr. Saikley,

SUBJECT: Illegal Activity in the Conservation District and on Public Lands Identified
As Tax Map Key: (1) 3-8-001:073

NOTICE IS HEREBY GIVEN that you are in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled "Conservation District" providing for land use within the Conservation District, enacted pursuant to Chapter 183C, Hawaii Revised Statutes (HRS) and Title 13, Chapter 221, entitled "Unencumbered Public Lands" providing for the control of public activities on unencumbered public lands, enacted pursuant to Chapter 171, HRS.

An inspection of the premises on which the illegal activity has been conducted was made on August 8, 2005 by the Department of Land and Natural Resources. We have determined that:

- 1) The subject property, identified as tax map keys: (1) 3-8-001:001 and 073, is in the Conservation District (General/Resource/Limited/Protected Subzone) and is encumbered public lands;
The following uses were conducted on the subject premises: Placement of two alleged unauthorized containers, Landscaping and Tree Debris on TMK's: (1) 3-8-001:001 and 073
- 2) These uses were not authorized by the Department of Land and Natural Resources under either Chapter 13-5 or 13-221, HAR.

YOU ARE HEREBY ORDERED TO CEASE any further activity on the subject premises. Should you fail to cease such illegal activity immediately, you will be subject to fines up to \$2,000 per day pursuant to Chapter 13-5, HAR, and \$500 per day pursuant to Chapter 13-221, HAR, in addition to administrative costs incurred by the Department.

Please contact Samuel Lemmo of the Office of Conservation and Coastal Lands at 587-0381 to clear this matter.

By:

PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

c: DOCARE Patti Edwards
OCCL/DOFAW - Dave Smith
Oahu Land District Office District

EXHIBIT 5

Sutton Construction Company, Inc.

General Contracting & Construction Management
License No. 15133

Date: 8/10/2005

To: State of Hawaii
Dept. of Land and Natural Resources
Office of Conservation and Coastal Lands

Attn: Samuel Lemmo

From: William Barber, Project Manager

Re: Enforcement Case OA-06-12

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2005 AUG 11 P 1:57
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Dear Mr. Lemmo,

Please be advised that Sutton Construction, in response to a meeting with Patti Edwards, David Smith and Dawn Hegger on August 8 and a subsequent request to remove two roll-off dumpsters adjacent to 101 Paiko Drive, has complied and relocated the containers off State land.

As for the "Landscaping and Tree Debris" cited in the notice, I think this refers to past activities of the Owners which we will help clean up if somebody could exactly identify the problem area(s) so we can be good neighbors when we are working at the site.

I met again with Patti Edwards this morning and she witnessed our compliance with DLNR's request as she handed me a copy of a notice to the Owner of the property we are Contracted to renovate.

We sincerely apologize for the unauthorized placement of the containers on State land and will contact Charlene Unoki with the Land Division for permission in the future should we need help with Land use issues.

Please call me on my cell @ 783-0380 if you have any questions regarding this matter.

Sincerely,



William Barber
Sutton Construction Company, Inc.

EXHIBIT 6

Cc: David Smith, Patti Edwards, Dawn Hegger, John Sutton, Garrett Saikley

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

File No.: ENF HA-04-37

January 13, 2006

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Enforcement File No. HA-04-37
Regarding Alleged, Unauthorized Grubbing and Grading, Tree
Removal, Construction of Pathway, and Removal of Rocks to Create
a Pond on Privately-owned Land Located in the State Land Use
Conservation District

BY: Lilikoi Trust, c/o John and Maureen Gapp, P.O. Box 1128, Pahoa,
Island of Hawaii, 96778

LAND OWNERSHIP: Same

TMK: (3) 1-5-010:032

AREA OF PARCEL: Approximately 5.586 Acres

AREA OF USE: Approximately 1 Acre Conservation District
Approximately 4.586 Acres Agricultural District

LOCATION: Puna District, Island of Hawaii

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject parcel TMK: (3) 1-5-010:032 is owned by the alleged, John and Maureen Gapp, and is located in the Puna District, Island of Hawaii. The subject parcel abuts the Government Beach Road to the southwest, private parcels to the northwest and southeast, and the ocean to northeast. Access to the subject parcel is from the Government Beach Road. The subject parcel is located in the State Land Use Conservation District, Resource subzone (**Exhibits 1, 2, & 3**).

ALLEGED UNAUTHORIZED LAND USES:

On January 5, 2003, a Department of Land and Natural Resources (DLNR), Division of Conservation and Resources Enforcement (DOCARE) officer investigated a complaint regarding a grubbing and grading action that had been conducted within 300 feet of the shoreline.

The DOCARE report indicated that: 1) an area approximately 140 feet long (north to south) and 75 feet wide (east to west) had been cleared approximately 70 feet from the shoreline (rocks and vegetation had been pushed to the edges of the cleared area); 2) a hole approximately 10 feet wide and 10 feet deep had been dug at the south end of the cleared area; 3) a path approximately 70 feet long and 16 feet wide extended from the cleared area east to the shoreline; and 4) piles of rocks on the left and right side of the path appeared to be coral and seaweed encrusted, indicating that they were possibly removed from the ocean fronting the path to create a pond. The photographs attached to the report are shown in **Exhibit 4**.

On January 14, 2003, Mrs. Gapp came to the DOCARE East Hawaii branch to be interviewed. She noted that "all the work on the parcel was done at her and her husband's request on the weekends and she did not want to reveal the equipment operators name...that the work started on the weekend of December 21-22, 2002, and the weekend of January 4-5, 2003." The alleged also stated that she was aware the parcel was located within the Conservation District, but did not know what activities were prohibited in the Conservation District.

On January 27, 2003, Mrs. Gapp wrote to the OCCL to summarize the steps she had taken to find out about the subject parcel's zoning from the various county and state agencies. She noted that she called the DLNR, and talked to Anthony Ching regarding a boundary interpretation. She noted they spent the weekend of January 4, and 5th, 2003 clearing the weeds, lauhala, and Albeezia trees in the area closest to the shoreline (**Exhibit 5**).

On April 15, 2003, the OCCL wrote to the alleged and told them the matter would be scheduled before the Board of Land and Natural Resources (BLNR) at a time, date, and location to be announced (**Exhibit 6**).

On July 21, 2003, the OCCL wrote to the alleged regarding their January 27, 2003 letter. The OCCL noted no information had been received from the alleged regarding the subject parcel, and clarified that Anthony Ching is the Executive Director of the State Land Use Commission (LUC) and is not part of the DLNR. Since the alleged noted they were going to be away from the country starting February 21, 2003, for 12 to 18 months, the matter would have to be resolved upon their return. (**Exhibit 7**).

On November 2, 2005, the OCCL wrote to Mrs. Gapp and requested that she contact the department if she had returned from their travel. It was also noted Enforcement Case HA-04-28 would be placed on the January 13, 2006 BLNR's agenda (**Exhibit 8**).

On November 4, 2005, Maureen Gapp called and faxed a letter to the OCCL (**Exhibit 9**).

The alleged, unauthorized four violations which are the subject of the staff report are: 1) grubbing and grading; 2) tree removal; 3) pathway construction; and 4) removal of rocks to create a pond.

REFERRAL OF ALLEGED VIOLATIONS TO THE LAND BOARD RATHER THAN THE HEARING OFFICER/ADMINISTRATIVE PENALTY SYSTEM (HOAPS):

The alleged violations have been referred to the Board of Land and Natural Resources (BLNR) rather than HOAPS because of the seriousness of the violations¹.

RESOLUTION OF UNAUTHORIZED LAND USES:

Conservation District

Chapter 13-5, Hawaii Administrative Rules (HAR) and Chapter 183C, Hawaii Revised Statutes (HRS), regulate land uses in the Conservation District by identifying a list of uses that may be allowed by Conservation District Use Permit. The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained. Chapter 13-5, HAR defines "land use" in part as: the placement or erection of any solid material on land or the grading, removing or dredging of any material or natural resource on land.

The following uses are alleged to be unauthorized: 1) grubbing and grading; 2) rock removal to create a pond; 3) tree removal; and 4) construction of a pathway. This report and staff recommended conditions seek to resolve the four (4) Conservation District violations. Pursuant to Chapter 183C, HRS, the maximum fine for a Conservation District violation is \$2,000 per violation in addition to administrative costs, costs associated with the land and/or habitat restoration, if required, and damages to state land. After written or verbal notification from the Department, willful violation of this section may incur an additional fine of up to \$2,000 per day per violation for each day the violation persists.

DISCUSSION:

The alleged, unauthorized four violations which are the subject of the staff report are: 1) grubbing and grading; 2) tree removal; 3) pathway construction; and 4) removal of rocks to create a pond.

Staff is concerned about this case in that it appears that the violations are willful in nature. Staff is concerned that a large amount of time has passed to resolve the initial violation reported by DOCARE in January 2003. Due to the nature of the Gapp's profession the department has waited to resolve the case. The Gapps noted they would be out of the country from February 2003, and would return 12 to 18 months from then (approximately August 2004). Staff had hoped to resolve the matter when the Gapps returned to the Big Island (*refer to Exhibit 3*).

¹ HOAPS distinguishes between Level I and Level II violations, the former being the more serious category which is referred to the Board, and the latter, minor violations, referred to HOAPS.

Mrs. Gapp noted she spoke to several county and state agencies regarding the subject parcel's zoning. However, staff notes OCCL departmental records do not indicate any communication and/or approvals that were received for the four (4) alleged violations.

Staff notes on December 10, 2002, the State of Hawaii, Department of Business, Economic Development, and Tourism (DBEDT), Land Use Commission (LUC) wrote to John and Maureen Gapp regarding their subject parcel and attached Boundary Interpretation 02-42². The letter noted "the boundary follows an average setback of 300 feet from the shoreline (**Exhibit 10**)."

Mrs. Gapp believes, as indicated in her letter, she talked to the DLNR but in reality she has spoken with Anthony Ching of the Land Use Commission. Staff notes that Mrs. Gapp said she checked with the "DLNR's" Anthony Ching "and asked about the Conservation District and if she could get an interpretation..." I received a map and short letter DLNR noting that the Conservation District was approximately 300 feet from the shoreline, it was my understanding that since no other information was sent that this referred to the distance from the shoreline, where we could build a single family home." Staff notes Mr. Ching is the Executive Director of the LUC, and again notes that he is not affiliated with the DLNR. Staff also notes Mrs. Gapp should have seen that the letterhead was from the LUC, and not the DLNR.

Staff notes there was significant damage done to the natural resources, due to the grubbing and grading, tree removal, and pathway construction, as evidenced by the DOCARE site inspection photographs. Staff notes the photographs indicate grading cleared pathway; rocks removed from the ocean encrusted with coral and seaweed; a large hole; and a large pile of what appears to be lauhala trees. Unfortunately, staff does not know how many lauhala trees were cut, because it appears that the stumps were grubbed out.

Staff notes the lauhala serve as an important conservation value such as habitat for native species, and watershed values. Staff notes the Gapps, through their actions, could have disrupted some of the above important functions. Staff notes the DOCARE report indicated the rocks that were removed to create the pond had corral and seaweed on them. Staff notes the disturbance to the area could have also disrupted ocean resource functions.

Staff recommends to the Board of Land and Natural Resources that the alleged should be fined \$2,000.00 for each of the four (4) violations (grubbing and grading, tree removal, pathway construction, removal of rocks to create a pond); total fine \$8,000.00.

Staff notes the Gapp should know the subject parcel's boundary, and its zoning laws. Staff notes a portion of the subject parcel is zoned Conservation District (1-acre), but the majority of the parcel is zoned Agricultural District (4.586-acres). Staff notes when a landowner buys a subject parcel they should be aware of the state zoning; is responsible for complying with the state zoning; and should have checked with the appropriate authorities about the state zoning.

Lastly, staff notes that although the area may have recovered from the grubbing and grading, as the

² A map of the subject parcel was attached with the Boundary Interpretation and is shown as the Exhibit.

action occurred approximately 3 years ago, there is the potential for invasive, alien species to grow as well. Staff recommends to the Board that the Gapps submit a report to the OCCL, within 30 days from the Board's decision, regarding the condition of the land located in the Conservation District. If required a maintenance plan shall be implemented to remove invasive, alien species. Should the Gapps not comply with these conditions, they shall be fined \$2,000.00 per day, starting from the date of the Board's action.

Administrative Costs

The following divisional resources were used: 1) OCCL; and 2) DOCARE – East Hawaii Branch. Staff recommends an administrative cost for OCCL of \$500 and DOCARE administrative cost of \$500; total of **\$1,000.00**.

This submittal and notice of the Board's meeting will be sent to John and Maureen Gapp by certified mail to the address of record in Hawaii. In addition, staff will request DOCARE's assistance in an attempt to personally serve the landowner with this submittal and notice of the Board's meeting in person.

FINDINGS:

1. That John and Maureen Gapp did in fact, authorize, cause or allow four (4) unauthorized violations to occur on subject parcel TMK: (3) 1-5-010:032 (grubbing and grading; rock removal to create a pond; tree removal; construction of a pathway);
2. That Gapp's unauthorized land uses are willful in nature;
3. That the Gapp's were aware of the location of Conservation District boundary; and
4. That the unauthorized land use occurred within the State Land Use Conservation District, Resource subzone.

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to Chapter 183C, Hawaii Revised Statutes (HRS), the Board find the landowner in violation of Chapter 183C HRS and Chapter 13-5, Hawaii Administrative Rules (HAR), and is subject to the following:

1. That John and Maureen Gapp violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in four (4) instance by failing to obtain the appropriate approval for the alleged, unauthorized grubbing and grading action; 2) rock removal for the pond's creation; 3) tree removal; and 4) construction of a pathway on subject parcel TMK: (3) 1-5-010:032 within the Conservation District. John and Maureen Gapp are fined **\$8,000.00** for four (4) Conservation District violations;

2. That John and Maureen Gapp is fined an additional **\$1,000.00** for administrative costs associated with the subject violations;
3. That John and Maureen Gapp shall pay all fines **\$9,000.00** within thirty (30) days of the date of the Board's action;
4. That the Gapps submit a report to the OCCL, within 30 days from the Boards decision, regarding the condition of the land located in the Conservation District. If required a maintenance plan shall be implemented to remove invasive, alien species.
5. No further work shall occur on the subject parcel within the Conservation District, without the Board of Land and Natural Resources approval; Chairman's approval and/or OCCL approval. If further work occurs in the Conservation District without approval; the alleged will be fined an additional \$2,000 a day;
6. That in the event of failure of the parties to comply with any order herein, the parties shall be fined an additional \$2,000 per day until the order is complied with; and
7. That in the event of failure of the parties to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.


Respectfully submitted,



Dawn T. Hegger, Planner
Office of Conservation and Coastal Lands

Approved for submittal:



 PETER T. YOUNG, Chairperson
Department of Land and Natural Resources

approximate location
(3) 1-5-10:032

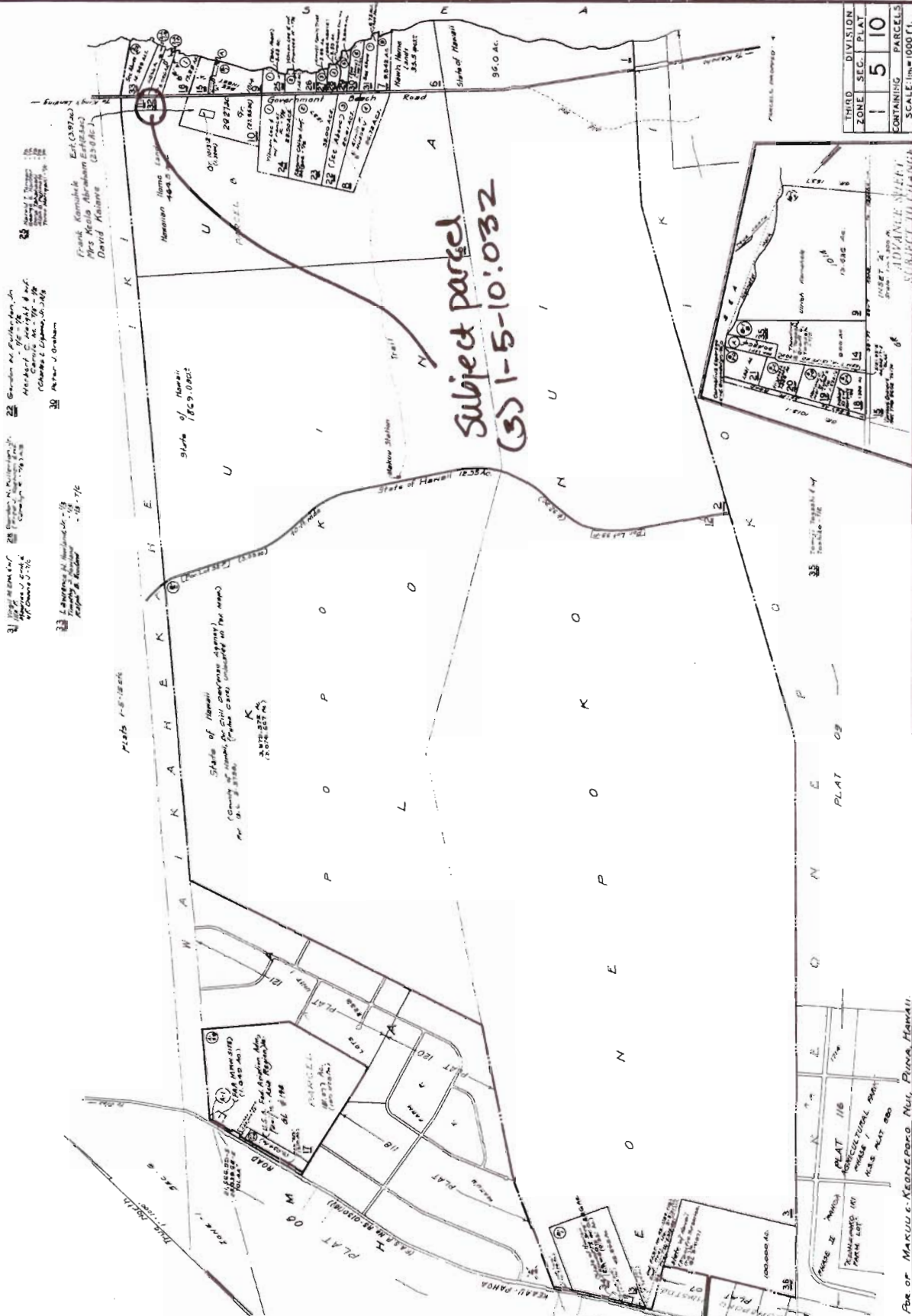
EXHIBIT 1

FOR OF MAKUUG-KEONEPOKO NUI, PUNA, HAWAII.

PRINTED

THIRD		DIVISION	
ZONE	SEC.	PLAT	
1	5	10	

CONTAINING PARCELS
SCALE: 1 in. = 1000 ft.



**HAWAII COUNTY
REAL PROPERTY
TAX OFFICE**

HEI

[Home](#) [Property Search](#)

RECORD DETAILS

[Owner](#) [Address](#) [Parcel Number](#) [Advanced](#)

► Parcel Data

[Sales](#)[Permits](#)[Land](#)[Residential](#)[Commercial](#)[Det. Structures](#)[Sketch](#)[Values](#)[Tax Bill](#)[2003 Tax History](#)[2002 Tax History](#)[2001 Tax History](#)[2000 Tax History](#)[1999 Tax History](#)[Map](#)**150100320000****OLD GOVERNMENT ROAD****LILIKOI TRUST****Parcel Data**

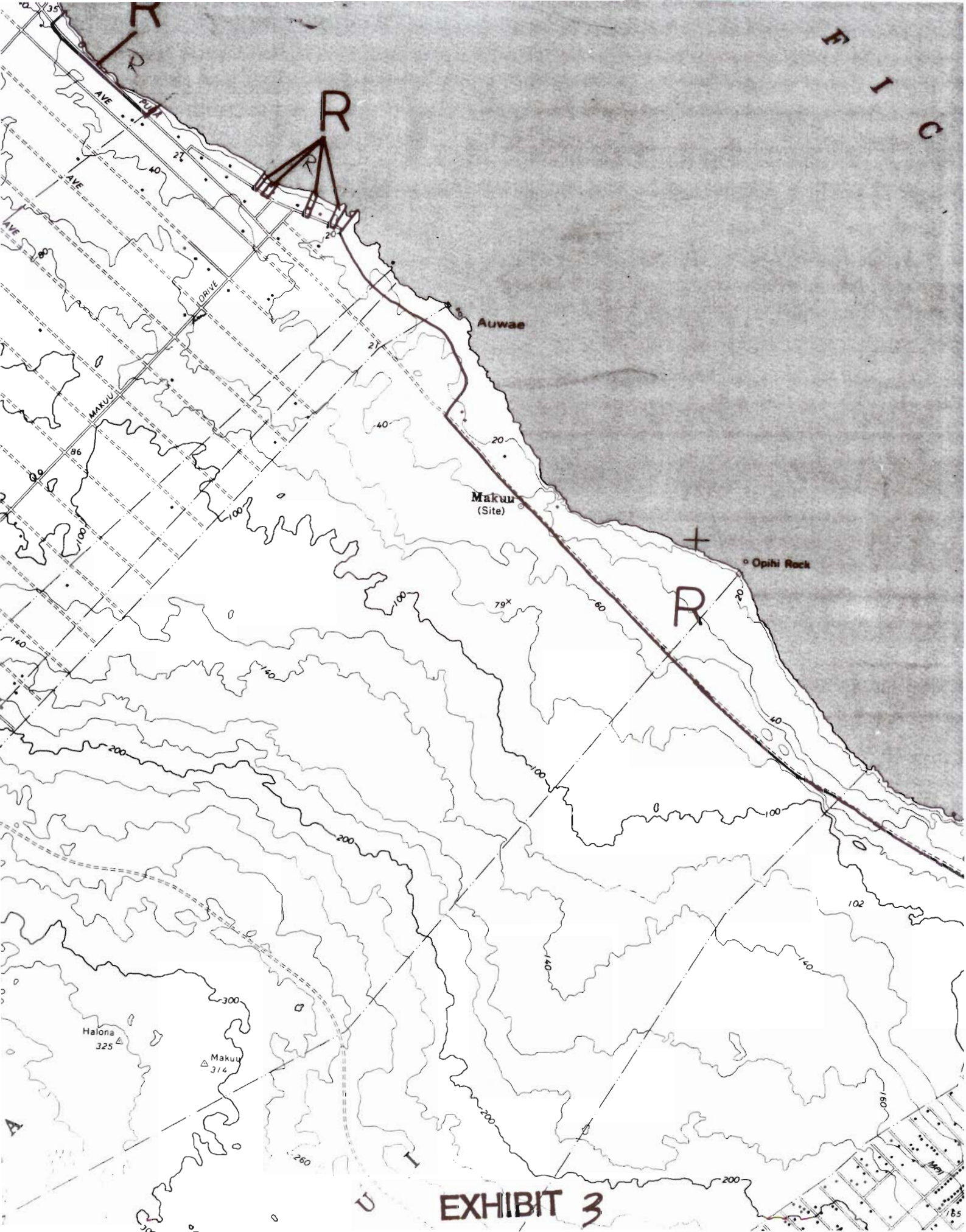
Site Address	OLD GOVERNMENT ROAD
Unit No.	
Property Class	AGRICULTURAL
Zoning	AGRICULTURAL 1 ACRE

Owner

Owner	Address	City	State	Country	Zip Code
LILIKOI TRUST	C/O GAPP, JOHN TTEE	P O BOX 1128	PAHOA	HI	96778

Ret

Data Copyright Hawaii County [Disclaimer] Last Updated: 6/25/2004
Site Design Copyright 1999-2002 Akanda Group LLC. All rights reserved.



STATE OF HAWAII
DLNR/DOCARE

EXHIBIT # 1

PHOTOGRAPHIC RECORD

REPORT# ~~1109920~~

Classification : LAND USE: CDUA VIOLATION

Page 1 of 2 Pages

DATE/TIME: January 6 2003/1125hrs.

PHOTOGRAPHER: ~~XXXXXXXXXX~~

NUMBER OF PHOTOGRAPHS TAKEN: 21

CAMERA USED: Olympus C-2000 Digital

WEATHER: Clear, Sunny DAY xx NIGHT

PHOTOGRAPH #	DESCRIPTION
1	Photograph Depicts path cleared into the ocean at TMK: 1-5-010: 32. Path is approximately 16 feet wide.
2	Photograph Depicts path cleared into the ocean at TMK: 1-5-010: 32. Path is approximately 16 feet wide.
3	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32. Rocks are brown and appear to have been removed from an area that was wet.
4	Photograph depicts path cleared into the ocean at TMK: 1-5-010:32. Photograph was taken on the north side of the path facing southward.
5	Photograph depicts path cleared into the ocean at TMK 1-5-010:32. Photograph also shows a pile of rocks white rocks that appear to have been removed from ocean.
6	Photograph depicts path cleared into ocean at TMK: 1-5-010:32, taken from the top of the path from west to east. Path is approximately 70 feet long.
7	Photograph depicts path cleared into ocean at TMK: 1-5-010:32, taken from the middle of the path from west to east.
8	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32.
9	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32
10	Photograph depicts path cleared into into ocean at TMK: 1-5-010:32, taken from the middle of the path from east to west.
11	Photograph depicts hole dug into ground at TMK: 1-5-010:32. Hole is approximately 10 feet wide and 10 feet deep, and is located on the south side of the property.
12	Photograph depicts hole dug into ground at TMK: 1-5-010:32 in the foreground and in the background a pile of rocks and debris removed from the hole.

OFFICER: ~~XXXXXXXXXX~~ BADGE # 56 DATE/TIME: 5-01-03/1200hrs.
SUPERVISOR: Bryan Sugiyama DATE/TIME:

STATE OF HAWAII
DLNR/DOCARE

EXHIBIT # 1

PHOTOGRAPHIC RECORD

REPORT# [REDACTED]

Classification : LAND USE: CDUA VIOLATION

Page 2 of 2 Pages

DATE/TIME: January 6 2003/1125hrs.

PHOTOGRAPHER: [REDACTED]

NUMBER OF PHOTOGRAPHS TAKEN: 21

CAMERA USED: Olympus C-2000 Digital

WEATHER: Clear, Sunny DAY xx NIGHT

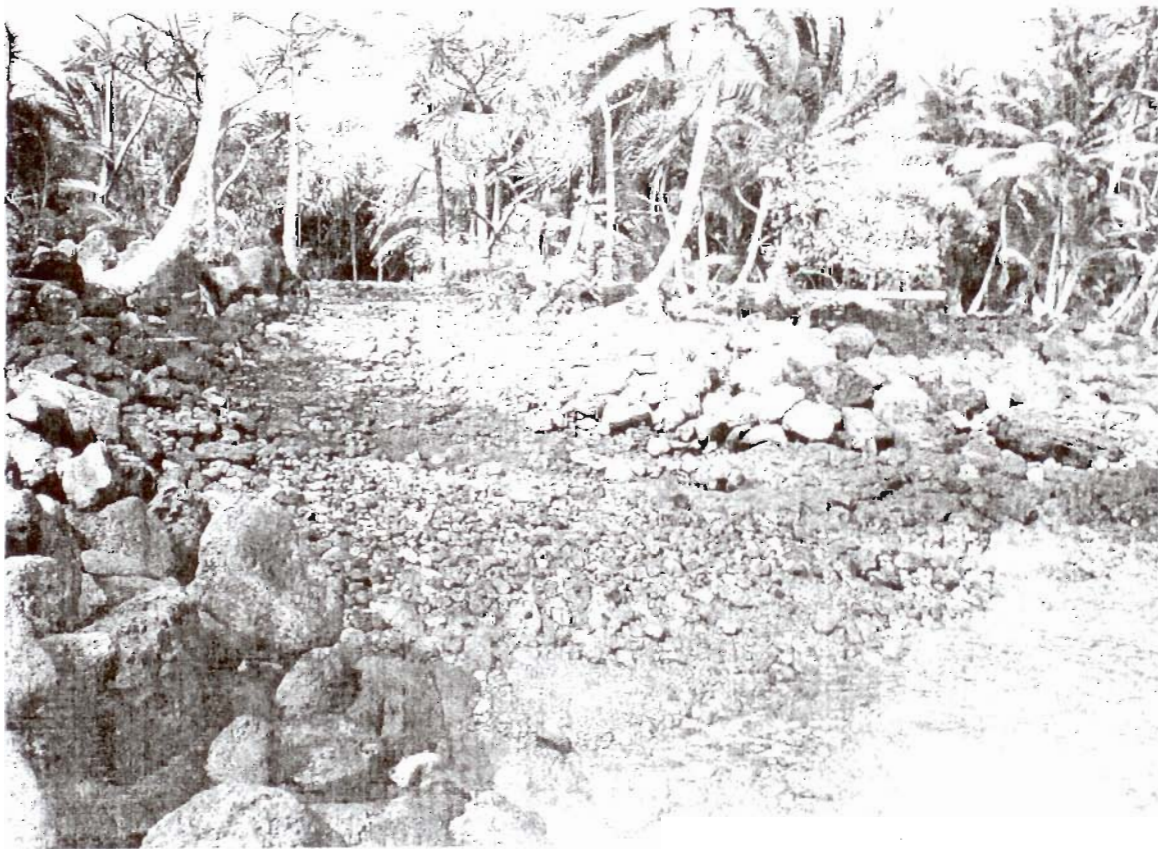
PHOTOGRAPH #	DESCRIPTION
13	Photograph depicts hole dug into ground at TMK: 1-5-010:32. Hole is approximately 10 feet wide and 10 feet deep, and is located on the south side of the property.
14	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the south to north. Cleared area is approximately 140 feet long and 75 feet wide.
15	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the south to north. Cleared area is approximately 140 feet long and 75 feet wide.
16	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the north to south from approximately the middle of the cleared area.
17	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from south to north.
18	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from north to south.
19	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from north to south from approximately the middle of the cleared area on a rock mound.
20	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from west to east in the middle of the cleared area on a rock mound.
21	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from south to north in the middle of the cleared area on a rock mound.
22	Photograph depicts trees pushed to the west end of the cleared area of TMK: 1-5-010:32.

OFFICER: [REDACTED] BADGE # 56 DATE/TIME: 5-01-03/1200hrs.
SUPERVISOR: Bryan Sugiyama DATE/TIME:

Photograph 1



Photograph 2



Photograph 3



Photograph 4



Photograph 5



Photograph 6



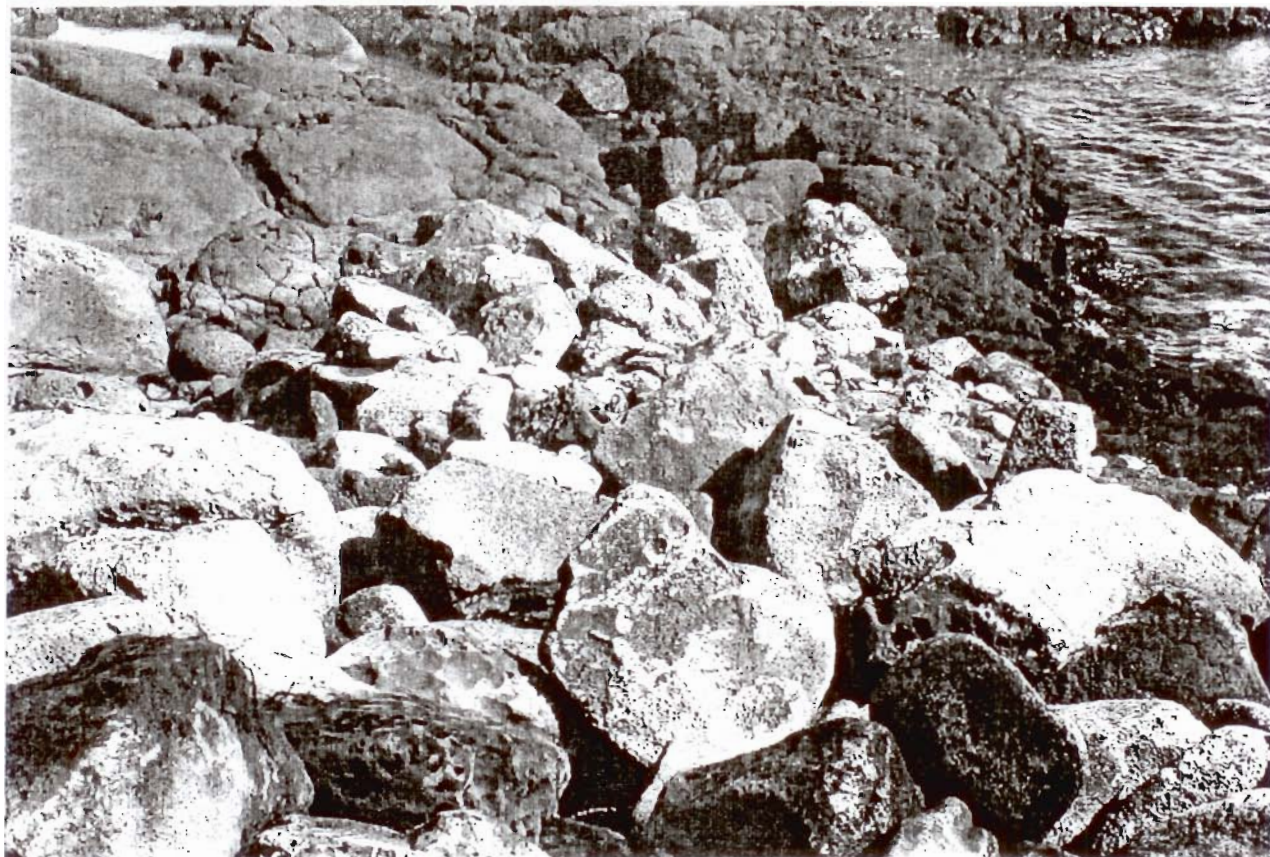
Photograph 7



Photograph 8



Photograph 9



Photograph 10



Photograph 11



Photograph 12



Photograph 13



Photograph 14



Photograph 15



Photograph 16



Photograph 17



Photograph 18



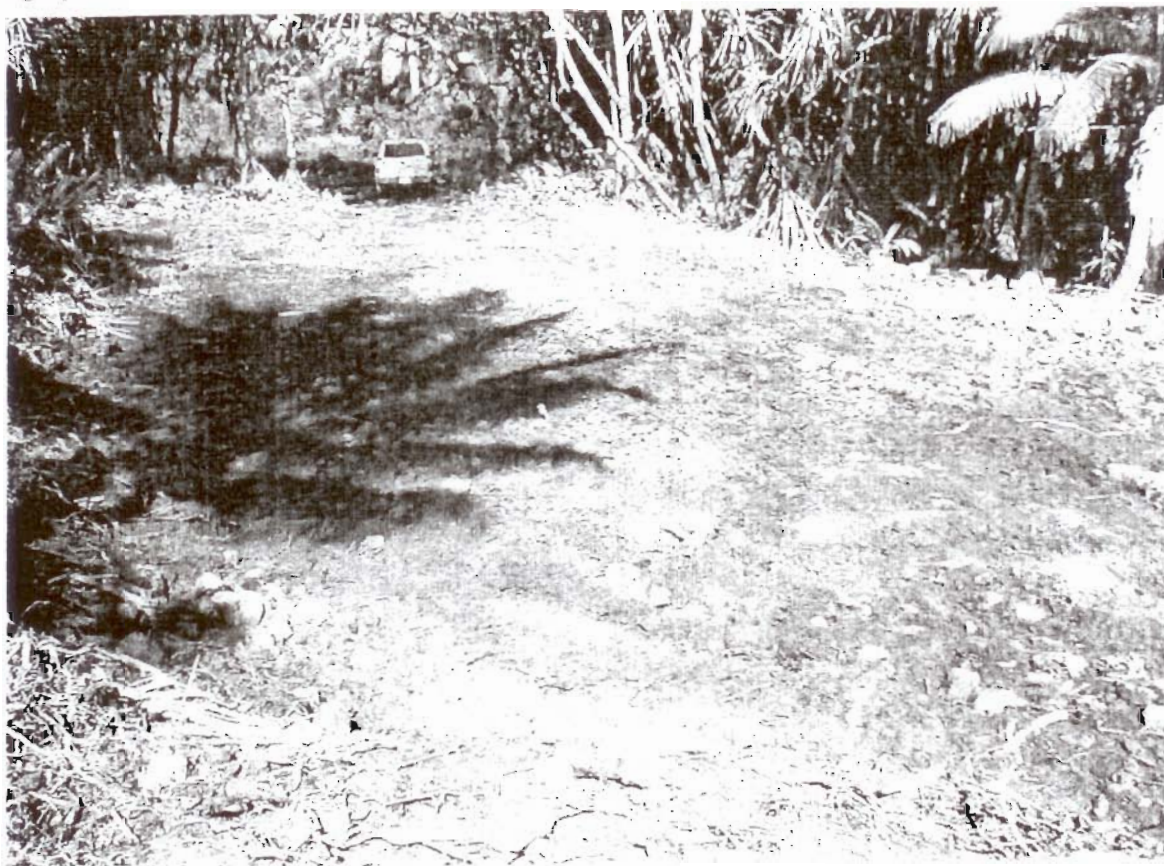
Photograph 19



Photograph 20



Photograph 21



Photograph 22





John & Maureen Gapp
PO Box 1128
Pahoa, HI 96778
808-966-9002

State Of Hawaii/Land Use Commission
Attention ;Sam Lemma
PO Box 2359
Honolulu, HI 96804

MAST
HA-03-96

January 27, 2003
Re: T-M-K :3-1-5-10-32

Dear Sam Lemma,

This is a follow up to our conversation last week regarding the work done on the property I purchased in December 2002, TMK 3-1-5-10-32.

I received a phone call from Jeffrey Darrow at the planning dept. that an anonymous complaint had been called in stating that grubbing was being done on a property located in the conservation area. I was very surprised by this phone call because I had gone to a lot effort to research the property and it seems I had repeatedly been given misinformation or in some cases limited information regarding what could and could not be done in this area. To date I have still not received anything but verbal information on what the limitations in a conservation area are. I will outline below the steps I took to investigate this property before I purchased it and after.

August 2002: I went to the Engineering Dept. and asked if the property was in a flood zone, the answer was no.

I then went over to the Planning Dept, and asked them to pull the map out which they did, I asked if I could build a single family home there. The answer, was I could build a single family home, but would not be able to do an Ohana. I could do a B&B possibly if I applied for a special permit. The gentleman also told me I could build within a hundred feet of the shoreline but, I would need to have a shoreline survey done. I told him I planned on building my home farther back than that, and he said not to worry about, it but if I changed my mind they would do the survey only once so not to do it till I was ready to build.

Sept. 24, 2002: We put an offer in on the property and soon after opened escrow.

★ **November 18, 2002:** I called the number in the phone book for the DLNR, and spoke with Anthony Ching and asked about the conservation zone and if I could get an interpretation of the boundary I told him I was purchasing the property and wanted to know more about it. He told me to fax my request, which I did.

★ **December 23, 2002 :** I received a map and short letter from DLNR stating that the conservation zone was approximately 300 feet from the shoreline. It was my understanding since no other information was sent that this referred to the distance from the shore, where we could build a single family home.

December 2002: Again in December while in the Planning dept. on other business I had the clerk pull out the map with our property on it and the clerk told me he and his wife often walked through the property to the tide pools on the shoreline and I jokingly told him that sometime next year we would be closing the road and he would have to walk in along the coast. Again there was no mention of SMA or State regulations regarding doing any ground work on the property.

EXHIBIT 5

January 3, 2003: I went to the engineering Dept. and gave them my TMK and asked if I would need a grubbing permit to do work on this property, I was told I would only if we were excavating greater than six feet down or moving more than 100 cubic yards.

★ < **January 4&5 2003:** We spent the weekend clearing the weeds, some Lahala, and Albeeziya trees, and in the area closest to the shoreline.

January 9, 2003: Phone call from Jeffrey Darrow regarding work down on our property.

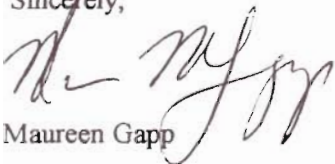
I have made numerous trips to the County to learn about this property including checking the property records at the tax office which showed there had been a home in the area we planned on clearing, and in fact we found and removed the trash left behind from this which included old beds, couches, and remnants of the plumbing. The property we purchased was until recently a 12 acre lot. The parcel was subdivided in to two lots. On the adjoining lot, an area less than 100 feet away from us, an equal size area had previously been cleared and is now just a flat area with grass on it. There is a Aqua Farm two lots over from us and a new home being built about a 1/8 of a mile down the road. All these things including a home previously there led me to believe I could grub and clear my property.

For a new landowner to approach so many County offices and the DLNR and not get the proper information shows a need for improvement on how to get the correct information to a new land owner. I was told by Jeffrey Darrow that although I asked many questions I failed to ask the right questions. This statement from him seems to me to be passing the blame because the system in place is faulty. I feel I made a good faith effort in obtaining as much information as possible concerning this property. The DLNR and or the county need to create a system possibly with the tax office so that when a property with restrictions is purchased the new owner is properly made aware of this. Especially if the restrictions are different from lot to lot on the same street and the same ocean.

★ [My husband and myself will be leaving the country on February 21, 2003. We will be going on a medical mission through New Guinea and the Solomon Islands by boat for the next 12-18 months. Not being here to clear this up makes this situation all the more frustrating. Since there is no ecological harm or harm to the public by clearing and grubbing such a small area on our property, this matter will have to be resolved upon our return. It is my hope that this case will encourage changes within an obviously faulty system and maybe changes can foster a better exchange of information between county and State offices.

Correspondence can be sent to PO Box 1128 in Paho. The mail will be forwarded to us every 2-3 months. I can be reached at the number listed above until I leave in February.

Sincerely,


Maureen Gapp

CC: Chris Yuen
Planning Director County of Hawaii

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. Box 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

DAN DAVIDSON
DEPUTY DIRECTOR FOR LAND

ERNEST Y.W. LAU
DEPUTY DIRECTOR FOR
THE COMMISSION ON WATER
RESOURCE MANAGEMENT

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND RESOURCES
ENFORCEMENT
CONVEYANCES
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE
COMMISSION
LAND
STATE PARKS

REF:PB:DH

Violation: HA-03-26

CERTIFIED/RETURN RECEIPT

APR 15 2003

Mr. and Mrs. John Gapp
13-1295 Kahukai Street
Pahoa, Hawaii 96778

Dear Mr. and Mrs. Gapp,

SUBJECT: Alleged Unauthorized Grubbing and Grading on Land Located within the Conservation District, Subject Parcel TMK: (3) 1-5-010:032

The Department is currently reviewing the alleged violation, regarding unauthorized grading and grubbing on land located within the State Land Use Conservation District. The Department will notify you when the issue will be scheduled before the Board of Land and Natural Resources meeting, at a time, date and location to be announced. In the meantime, you may wish to contact us to discuss these matters at your earliest convenience.

Please call Dawn Hegger of the Planning Branch at 587-0380, should you have any questions on this matter.

Very truly yours,

Dierdre S. Mamiya, Administrator
Land Division

7002 0510 0002 9969 3265

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
Postage \$	
Certified Fee \$	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent to: Mr. & Mrs. John Gapp 13-1295 Kahukai Street Pahoa, Hawaii 96778 City, State, ZIP+4	

Department

EXHIBIT 6



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON
DEPUTY DIRECTOR - LAND

ERNEST Y.W. LAU
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:PB:MM

Violation No. HA-03-26
Cor: HA-03-96

JUL 21 2003

John and Maureen Gapp
P.O. Box 1128
Pahoa, HI 96778

Dear Mr. and Mrs. Gapp:

Subject: Alleged Unauthorized Grubbing and Clearing on Conservation District Lands, TMK: (3) 1-5-010:032

The Office of Conservation and Coastal Lands is in receipt of your letter dated January 27, 2003 regarding alleged unauthorized grubbing and clearing in the resource subzone of the Conservation District at 47-141 Pulama Road, Kahalu'u, Hawaii.

Your letter notes you were given misinformation (or limited information) from the State and County of Hawaii despite numerous inquiries about what "could and could not be done in this area." The Department has no indication that you spoke with anyone in the Office of Conservation and Coastal Lands about identified land uses in the Resource subzone of the Conservation District.¹ The Department also doesn't know what information the various County offices gave you.

Your letter requests a resolution of this matter upon your return from travel abroad. As the landowners of the property where the alleged work was conducted, you should note that Chapter 13-5, Hawaii Administrative Rules (HAR) regulates land uses in the Conservation District. Under Chapter 13-5, Hawaii Administrative Rules, clearing or grubbing on Conservation District lands would require a CDUA, and the decision to permit the land use(s) would be at the discretion of the Board of Land and Natural Resources.

However, the Department recently sent you a letter, dated April 15, 2003, which noted we are currently reviewing the alleged violation, regarding the unauthorized grading and grubbing on land located within the State Land Use Conservation District. The

¹ We note that Anthony Chin is the Executive Director of the State Land Use Commission which is in a separate Department.

EXHIBIT 7

Department will notify you shortly to resolve this case through an administrative proceeding.

We hope this letter helps resolve some of the outstanding issues regarding your property. Please feel free to contact Matthew Myers, of the Office of Conservation and Coastal Lands at 587-0382.

Aloha,



Dierdre S. Mamiya
Acting Administrator
Office of Conservation
and Coastal Lands

Cc: Hawaii Board Member
Hawaii District Land Office
Chairperson's Office
DOCARE (Hawaii)



ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

REF:OCCL:DH

ENF: HA-04-28

John and Maureen Gapp
P.O. Box 1128
Pahoa, Hawaii, 96778

NOV - 2 2005

Dear Mr. and Mrs. Gapp,

SUBJECT: Enforcement File No. HA-03-26, Regarding Alleged, Unauthorized Grubbing and Grading, Tree Removal, Construction of Pathway, and Removal of Rocks on Subject Parcel TMK: (3) 1-5-010:035

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) has been waiting to hear from you to resolve Enforcement Case HA-04-28. The OCCL has been waiting to hear from you, upon your return to the State of Hawaii from your medical mission through New Guinea and the Solomon Islands. In your last correspondence with the department, dated February 3, 2003 (attached), you indicated you would return within 12 to 18 months from February 21, 2003 (approximately August 2004). More than a year has passed from this date. If you have returned to the state, please contact the office within two weeks of receipt of this letter.

The OCCL notes this matter will be placed on the Board of Land and Natural Resources (Board) agenda on Friday, January 13, 2006, which will commence at 9:00 AM, at the Kalanimoku Building, 1151 Punchbowl Street, Room 132, in Honolulu, Hawaii.

Please call Dawn Hegger of the Office of Conservation and Coastal Lands at 587-0380, should you have any questions on this matter.

Very truly yours,

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

c: Hawaii Branch DOCARE
Hawaii District Land Office
Hawaii County Planning Department
Mr. and Mrs. John Gapp
13-1295 Kahukai Street
Pahoa, Hawaii 96778

EXHIBIT 8

John & Maureen Gapp
PO BOX 1128
PAHAO, HI 96778
808-966-9002-PHONE
808-966-9007-FAX

J Hn: Dawn Hegger

FACSIMILE TRANSMITTAL SHEET

TO: Sam Lemmo	FROM: John Gapp
COMPANY:	DATE: 9-15-04
FAX NUMBER: 808 587 0322	TOTAL NO. OF PAGES INCLUDING COVER: 5
PHONE NUMBER:	
RE: T.M.K. 3-1-5-10-32	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

RECEIVED
OFFICE OF INFORMATION
2005 NOV -14 P 3:25

NOTES/COMMENTS:

Dawn,
This is the letter I sent
In Sept. 04. I did speak to you in
June 04 from Australia & then again in Aug 04
When I was back home, re: the Sept. 04 mtg.
my cell number here is 938-8677.

Thanks
Maureen Gapp

EXHIBIT 9

John & Maureen Gapp

PO Box 1128
Pahoa, HI 96778
808-966-9002 fax 808-966-9007

Sam Lemmo
State of Hawaii
DLNR
Office of Conservation and Coastal Lands
PO Box 621
HNL, HI 96809-0621
FAX - 808-587-0322

September 14, 2004

RE: Alleged unauthorized grubbing and grading on land located within the conservation district, parcel TMK (3) 1-5-010:032. Hearing date September 24, 2004

Dear Mr. Lemmo,

I am writing this letter to inquire as to whether or not the matter of the "alleged unauthorized grubbing and grading" can be handled without going through the Board. I have included my past correspondence to you to refresh your memory of our case. The meeting was rescheduled once and I was unable to get a refund on the air tickets for myself and my husband. The airfare alone to Oahu is approx. \$500 for us. I work as a nurse at Hilo Medical Center and the loss of wages is also considerable. It is an enormous burden for people on the outer islands to go to Oahu, to resolve matters that have occurred where we reside.

I still contend I was given wrong and misinformation in regards to the property. The grubbing that was done removed noxious weeds and weed trees (Balsa wood). We did not act out of malice. We ceased all work as soon as we were notified by Jeffrey Darrow, that were in violation of county and state rules and regulations. There was never any intent to do any harm to the area, we planned only to landscape it so we could access the property from the road on the property next to us. Our plan for the property is to simply build a single family home. Since Mr. Darrow informed us no work could be done on the property until the matter was resolved, we have stayed away from our own property. We sold our home to buy this property and are now having to rent a home, since we can't build on our property. The area that was cleared has since reverted back to its original overgrown state. I gave permission for the DOCARE officer to take photos of the property, if you need additional photos they can be provided. We are now aware of the procedure that must be complied with to build on the property and will of course follow them in the future.

On Sept. 8, 2004 I retraced my steps thru planning, property tax office and the DLNR office in the HILO State Office Building to see if things had changed. The changes were

few. The information given by the county is now more vague with instructions to "Go to the State Building". The county has changed the map of the area our property resides to a new white photo copy that has SMA written in red. This is suspiciously the only new page in the map book. I was told it had been recently revised. The Property tax office still has only conservation on the tax records and none of the clerks were aware of what SMA stood for. The only difference was at the DLNR office. This time instead of being told to "Call Oahu", I was given a Blue Book entitled "Conservation District Review, Identified Land Uses and Required Permits" Had I been given this book the first time I went there or Had Anthony Ching (Yes, I now know it was the wrong office), told me to get this book, this whole nightmare could have been avoided. This book very clearly tells what can be done and lists the correct phone numbers for information. It would be very helpful if this booklet were available at the county building as that is the first logical stop for most people seeking information regarding their property.

Again I sincerely hope this matter can be resolved through your department rather than a full board. We will make every effort to comply with any recommendation you make. Thank you for your time.

Respectfully,

The block contains two handwritten signatures. The first signature on the left is written in dark ink and appears to be 'John Gapp'. The second signature on the right is also in dark ink and appears to be 'Maureen Gapp'. Both signatures are fluid and cursive.

John & Maureen Gapp



STATE OF HAWAII
DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM
LAND USE COMMISSION

P.O. Box 2359
Honolulu, HI 96804-2359
Telephone: 808-587-3822
Fax: 808-587-3827

December 10, 2002

Ms. Maureen M. Gapp
P. O. Box 1128
Pahoa, Hawaii 96778

HA-03-30

Dear Ms. Gapp:

Subject: BOUNDARY INTERPRETATION No. 02-42
Tax Map Key No: 1-5-10:32
Makuu, Puna, Hawaii

Pursuant to your facsimile transmittal dated November 18, 2002, requesting a boundary interpretation for the subject parcel, please be advised that we have determined an approximate location of the State Land Use (SLU) Agricultural/Conservation District boundary.

Our determination is based on review of the Commission's records and maps currently on file at our office. These included the official map H-71 (North Pahoa Quadrangle), the 1969 Land Use Districts and Regulations Review, the relevant tax map dated January 1967, and the following boundary interpretations for adjacent parcels previously issued by the Commission:

- June 24, 1974;
- July 18, 1985;
- August 6, 1990 (BINO #90-44);
- July 17, 1992 (BINO #92-32);
- June 10, 1997 (BINO #97-15); and
- February 20, 2001 (BINO #00-43).

Review of these pertinent materials indicated that the SLU Agricultural/Conservation District boundary was established pursuant to the 1969 Five-Year Boundary Review to preserve the scenic coastline. As reflected on the official map, to the south of the subject parcel, the boundary follows the mauka side (southern side) of the Government Beach Road easement. As the Government Beach Road extends northward to the subject parcel, the boundary then follows an average setback of 300 feet from the shoreline. A more precise location of the boundary in this area would require that a valid certified shoreline survey map be provided.

EXHIBIT. 10

Ms. Maureen M. Gapp
December 10, 2002
Page 2

We have enclosed a half-size copy of Tax Map 1-5-10 with an approximate SLU Agricultural/Conservation District boundary delineated for your reference.

Should you require clarification or further assistance, please feel free to call Fred Talon or Bert Saruwatari of my staff at 587-3822.

Sincerely,


ANTHONY J. H. CHING
Executive Officer

Enclosure: Boundary Interpretation Map dated December 10, 2002

- c: Gilbert S. Coloma-Agaran, BLNR Chairperson (w/enclosure)
Attn: Dierdre S. Mamiya, Land Division
Christopher Yuen, Planning Director, County of Hawaii Planning Department (w/enclosure)
Mike McCall Valuation Analyst, Mapping Section, Real Property Tax Division, County
of Hawaii (w/enclosure)

U.C.

enlargement of
Subject parcel

Hawaiian Home Lands
464.5 ac.

AGRICULTURAL

PARCEL B

Gr. 1013.2
(11.38ac)



AGRICULTURAL

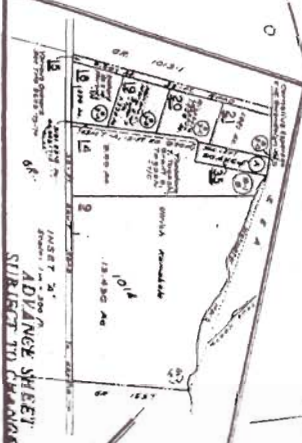
Frank Kamehale
P.O. Box 1000
Honolulu, Hawaii 96810

CONSERVATION

Boundary
Interpretation No. 02-42

The boundary as located, named and delineated is hereby certified as the actual land use district boundary as filed by the State Land Use Commission, Honolulu, Hawaii.

DEC 10 2002 by *William H. King*
Date Executive Director



THIRD	DIVISION
ZONE	SEG. PLAT
1	5 10
CONTAINING	PARCELS

PRINTED JAN 12 2003

EXHIBIT 3 Boundary Interpretation # 02-42

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

File No.: ENF HA-04-37

January 13, 2006

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Enforcement File No. HA-04-37
Regarding Alleged, Unauthorized Grubbing and Grading, Tree
Removal, Construction of Pathway, and Removal of Rocks to Create
a Pond on Privately-owned Land Located in the State Land Use
Conservation District

BY: Lilikoi Trust, c/o John and Maureen Gapp, P.O. Box 1128, Pahoa,
Island of Hawaii, 96778

LAND OWNERSHIP: Same

TMK: (3) 1-5-010:032

AREA OF PARCEL: Approximately 5.586 Acres

AREA OF USE: Approximately 1 Acre Conservation District
Approximately 4.586 Acres Agricultural District

LOCATION: Puna District, Island of Hawaii

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject parcel TMK: (3) 1-5-010:032 is owned by the alleged, John and Maureen Gapp, and is located in the Puna District, Island of Hawaii. The subject parcel abuts the Government Beach Road to the southwest, private parcels to the northwest and southeast, and the ocean to northeast. Access to the subject parcel is from the Government Beach Road. The subject parcel is located in the State Land Use Conservation District, Resource subzone (**Exhibits 1, 2, & 3**).

ALLEGED UNAUTHORIZED LAND USES:

On January 5, 2003, a Department of Land and Natural Resources (DLNR), Division of Conservation and Resources Enforcement (DOCARE) officer investigated a complaint regarding a grubbing and grading action that had been conducted within 300 feet of the shoreline.

The DOCARE report indicated that: 1) an area approximately 140 feet long (north to south) and 75 feet wide (east to west) had been cleared approximately 70 feet from the shoreline (rocks and vegetation had been pushed to the edges of the cleared area); 2) a hole approximately 10 feet wide and 10 feet deep had been dug at the south end of the cleared area; 3) a path approximately 70 feet long and 16 feet wide extended from the cleared area east to the shoreline; and 4) piles of rocks on the left and right side of the path appeared to be coral and seaweed encrusted, indicating that they were possibly removed from the ocean fronting the path to create a pond. The photographs attached to the report are shown in **Exhibit 4**.

On January 14, 2003, Mrs. Gapp came to the DOCARE East Hawaii branch to be interviewed. She noted that "all the work on the parcel was done at her and her husband's request on the weekends and she did not want to reveal the equipment operators name...that the work started on the weekend of December 21-22, 2002, and the weekend of January 4-5, 2003." The alleged also stated that she was aware the parcel was located within the Conservation District, but did not know what activities were prohibited in the Conservation District.

On January 27, 2003, Mrs. Gapp wrote to the OCCL to summarize the steps she had taken to find out about the subject parcel's zoning from the various county and state agencies. She noted that she called the DLNR, and talked to Anthony Ching regarding a boundary interpretation. She noted they spent the weekend of January 4, and 5th, 2003 clearing the weeds, lauhala, and Albeezia trees in the area closest to the shoreline (**Exhibit 5**).

On April 15, 2003, the OCCL wrote to the alleged and told them the matter would be scheduled before the Board of Land and Natural Resources (BLNR) at a time, date, and location to be announced (**Exhibit 6**).

On July 21, 2003, the OCCL wrote to the alleged regarding their January 27, 2003 letter. The OCCL noted no information had been received from the alleged regarding the subject parcel, and clarified that Anthony Ching is the Executive Director of the State Land Use Commission (LUC) and is not part of the DLNR. Since the alleged noted they were going to be away from the country starting February 21, 2003, for 12 to 18 months, the matter would have to be resolved upon their return. (**Exhibit 7**).

On November 2, 2005, the OCCL wrote to Mrs. Gapp and requested that she contact the department if she had returned from their travel. It was also noted Enforcement Case HA-04-28 would be placed on the January 13, 2006 BLNR's agenda (**Exhibit 8**).

On November 4, 2005, Maureen Gapp called and faxed a letter to the OCCL (**Exhibit 9**).

The alleged, unauthorized four violations which are the subject of the staff report are: 1) grubbing and grading; 2) tree removal; 3) pathway construction; and 4) removal of rocks to create a pond.

REFERRAL OF ALLEGED VIOLATIONS TO THE LAND BOARD RATHER THAN THE HEARING OFFICER/ADMINISTRATIVE PENALTY SYSTEM (HOAPS):

The alleged violations have been referred to the Board of Land and Natural Resources (BLNR) rather than HOAPS because of the seriousness of the violations¹.

RESOLUTION OF UNAUTHORIZED LAND USES:

Conservation District

Chapter 13-5, Hawaii Administrative Rules (HAR) and Chapter 183C, Hawaii Revised Statutes (HRS), regulate land uses in the Conservation District by identifying a list of uses that may be allowed by Conservation District Use Permit. The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained. Chapter 13-5, HAR defines "land use" in part as: the placement or erection of any solid material on land or the grading, removing or dredging of any material or natural resource on land.

The following uses are alleged to be unauthorized: 1) grubbing and grading; 2) rock removal to create a pond; 3) tree removal; and 4) construction of a pathway. This report and staff recommended conditions seek to resolve the four (4) Conservation District violations. Pursuant to Chapter 183C, HRS, the maximum fine for a Conservation District violation is \$2,000 per violation in addition to administrative costs, costs associated with the land and/or habitat restoration, if required, and damages to state land. After written or verbal notification from the Department, willful violation of this section may incur an additional fine of up to \$2,000 per day per violation for each day the violation persists.

DISCUSSION:

The alleged, unauthorized four violations which are the subject of the staff report are: 1) grubbing and grading; 2) tree removal; 3) pathway construction; and 4) removal of rocks to create a pond.

Staff is concerned about this case in that it appears that the violations are willful in nature. Staff is concerned that a large amount of time has passed before to resolve the initial violation reported by DOCARE in January 2003. Due to the nature of the Gapp's profession the department has waited to resolve the case. The Gapps noted they would be out of the country from February 2003, and would return 12 to 18 months from then (approximately August 2004). Staff had hoped to resolve the matter when the Gapps returned to the Big Island (*refer to Exhibit 3*).

¹ HOAPS distinguishes between Level I and Level II violations, the former being the more serious category which is referred to the Board, and the latter, minor violations, referred to HOAPS.

Mrs. Gapp noted she spoke to several county and state agencies regarding the subject parcel's zoning. However, staff notes OCCL departmental records do not indicate any communication and/or approvals that were received for the four (4) alleged violations.

Staff notes on December 10, 2002, the State of Hawaii, Department of Business, Economic Development, and Tourism (DBEDT), Land Use Commission (LUC) wrote to John and Maureen Gapp regarding their subject parcel and attached Boundary Interpretation 02-42². The letter noted "the boundary follows an average setback of 300 feet from the shoreline (**Exhibit 10**)."

Mrs. Gapp believes, as indicated in her letter, she talked to the DLNR but in reality she has spoken with Anthony Ching of the Land Use Commission. Staff notes that Mrs. Gapp said she checked with the "DLNR's" Anthony Ching "and asked about the Conservation District and if she could get an interpretation..." I received a map and short letter DLNR noting that the Conservation District was approximately 300 feet from the shoreline, it was my understanding that since no other information was sent that this referred to the distance from the shoreline, where we could build a single family home." Staff notes Mr. Ching is the Executive Director of the LUC, and again notes that he is not affiliated with the DLNR. Staff also notes Mrs. Gapp should have seen that the letterhead was from the LUC, and not the DLNR.

Staff notes there was significant damage done to the natural resources, due to the grubbing and grading, tree removal, and pathway construction, as evidenced by the DOCARE site inspection photographs. Staff notes the photographs indicate grading cleared pathway; rocks removed from the ocean encrusted with coral and seaweed; a large hole; and a large pile of what appears to be lauhala trees. Unfortunately, staff does not know how many lauhala trees were cut, because it appears that the stumps were grubbed out.

Staff notes the lauhala serve as an important conservation value such as habitat for native species, and watershed values. Staff notes the Gapps, through their actions, could have disrupted some of the above important functions. Staff notes the DOCARE report indicated the rocks that were removed to create the pond had corral and seaweed on them. Staff notes the disturbance to the area could have also disrupted ocean resource functions.

Staff recommends to the Board of Land and Natural Resources that the alleged should be fined \$2,000.00 for each of the four (4) violations (grubbing and grading, tree removal, pathway construction, removal of rocks to create a pond); total fine \$8,000.00.

Staff notes the Gapp should know the subject parcel's boundary, and its zoning laws. Staff notes a portion of the subject parcel is zoned Conservation District (1-acre), but the majority of the parcel is zoned Agricultural District (4.586-acres). Staff notes when a landowner buys a subject parcel they should be aware of the state zoning; is responsible for complying with the state zoning; and should have checked with the appropriate authorities about the state zoning.

Lastly, staff notes that although the area may have recovered from the grubbing and grading, as the

² A map of the subject parcel was attached with the Boundary Interpretation and is shown as the Exhibit.

action occurred approximately 3 years ago, there is the potential for invasive, alien species to grow as well. Staff recommends to the Board that the Gapps submit a report to the OCCL, within 30 days from the Board's decision, regarding the condition of the land located in the Conservation District. If required a maintenance plan shall be implemented to remove invasive, alien species. Should the Gapps not comply with these conditions, they shall be fined \$2,000.00 per day, starting from the date of the Board's action.

Administrative Costs

The following divisional resources were used: 1) OCCL; and 2) DOCARE – East Hawaii Branch. Staff recommends an administrative cost for OCCL of \$500 and DOCARE administrative cost of \$500; total of **\$1,000.00**.

This submittal and notice of the Board's meeting will be sent to John and Maureen Gapp by certified mail to the address of record in Hawaii. In addition, staff will request DOCARE's assistance in an attempt to personally serve the landowner with this submittal and notice of the Board's meeting in person.

FINDINGS:

1. That John and Maureen Gapp did in fact, authorize, cause or allow four (4) unauthorized violations to occur on subject parcel TMK: (3) 1-5-010:032 (grubbing and grading; rock removal to create a pond; tree removal; construction of a pathway);
2. That Gapp's unauthorized land uses are willful in nature;
3. That the Gapp's were aware of the location of Conservation District boundary; and
4. That the unauthorized land use occurred within the State Land Use Conservation District, Resource subzone.

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to Chapter 183C, Hawaii Revised Statutes (HRS), the Board find the landowner in violation of Chapter 183C HRS and Chapter 13-5, Hawaii Administrative Rules (HAR), and is subject to the following:

1. That John and Maureen Gapp violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in four (4) instance by failing to obtain the appropriate approval for the alleged, unauthorized grubbing and grading action; 2) rock removal for the pond's creation; 3) tree removal; and 4) construction of a pathway on subject parcel TMK: (3) 1-5-010:032 within the Conservation District. John and Maureen Gapp are fined **\$8,000.00** for four (4) Conservation District violations;

2. That John and Maureen Gapp is fined an additional **\$1,000.00** for administrative costs associated with the subject violations;
3. That John and Maureen Gapp shall pay all fines **\$9,000.00** within thirty (30) days of the date of the Board's action;
4. That the Gapps submit a report to the OCCL, within 30 days from the Boards decision, regarding the condition of the land located in the Conservation District. If required a maintenance plan shall be implemented to remove invasive, alien species.
5. No further work shall occur on the subject parcel within the Conservation District, without the Board of Land and Natural Resources approval; Chairman's approval and/or OCCL approval. If further work occurs in the Conservation District without approval; the alleged will be fined an additional \$2,000 a day;
6. That in the event of failure of the parties to comply with any order herein, the parties shall be fined an additional \$2,000 per day until the order is complied with; and
7. That in the event of failure of the parties to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.


Respectfully submitted,



Dawn T. Hegger, Planner
Office of Conservation and Coastal Lands

Approved for submittal:



 PETER T. YOUNG, Chairperson
Department of Land and Natural Resources

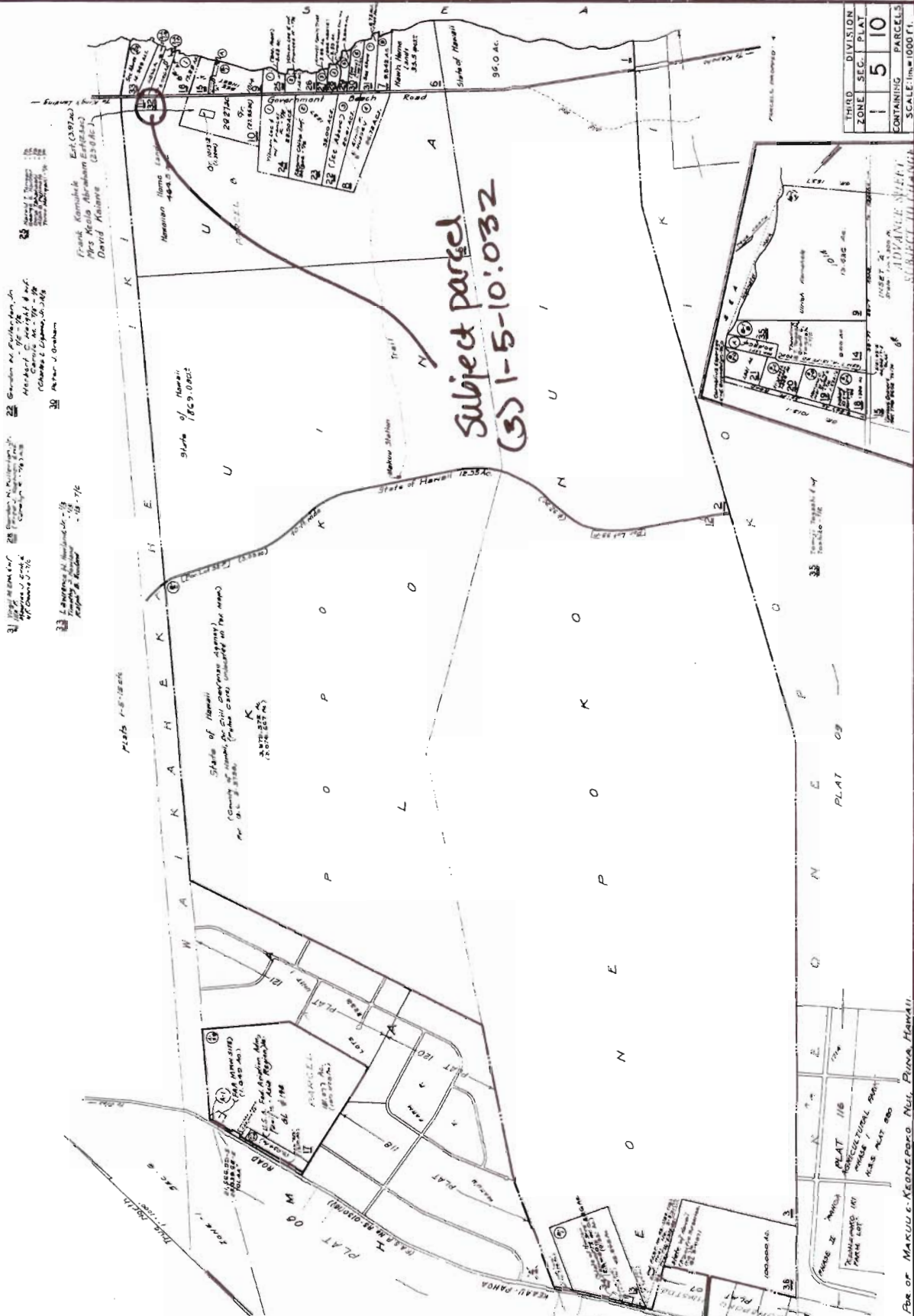
approximate location
(3) 1-5-10:032

EXHIBIT 1

POB OF MAKUUG-KEONEPOPO NUI, PUNA, HAWAII.

PRINTED

THIRD	DIVISION	
ZONE	SEC.	PLAT
1	5	10
CONTAINING PARCELS		
SCALE: 1 in. = 1000 ft.		



**HAWAII COUNTY
REAL PROPERTY
TAX OFFICE**

HEI

[Home](#) [Property Search](#)

RECORD DETAILS

[Owner](#) [Address](#) [Parcel Number](#) [Advanced](#)

► Parcel Data

[Sales](#)[Permits](#)[Land](#)[Residential](#)[Commercial](#)[Det. Structures](#)[Sketch](#)[Values](#)[Tax Bill](#)[2003 Tax History](#)[2002 Tax History](#)[2001 Tax History](#)[2000 Tax History](#)[1999 Tax History](#)[Map](#)**150100320000****OLD GOVERNMENT ROAD****LILIKOI TRUST****Parcel Data**

Site Address	OLD GOVERNMENT ROAD
Unit No.	
Property Class	AGRICULTURAL
Zoning	AGRICULTURAL 1 ACRE

Owner

Owner	Address	City	State	Country	Zip Code
LILIKOI TRUST	C/O GAPP, JOHN TTEE	P O BOX 1128	PAHOA	HI	96778

Ret

Data Copyright Hawaii County [Disclaimer] Last Updated: 6/25/2004
Site Design Copyright 1999-2002 Akanda Group LLC. All rights reserved.

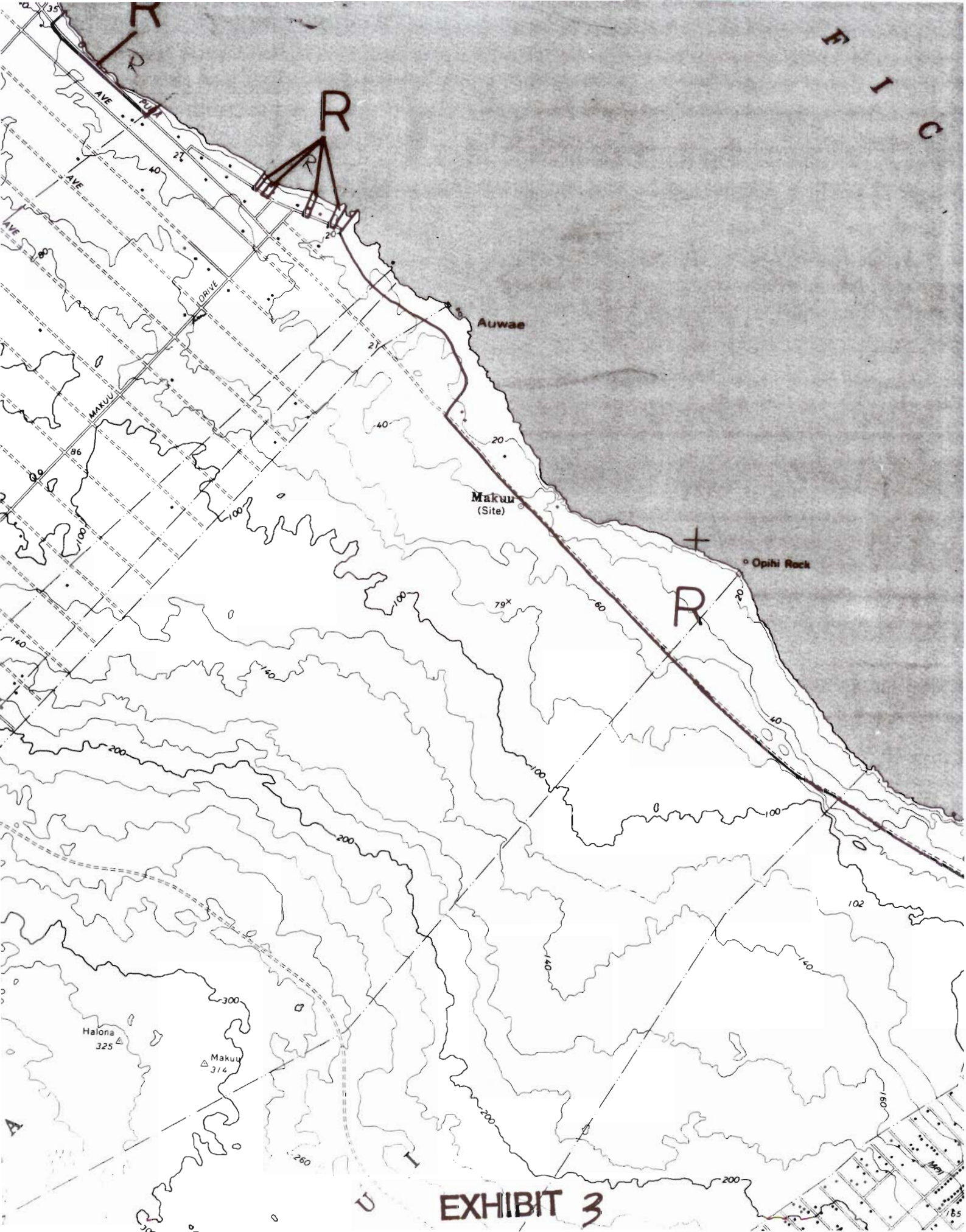


EXHIBIT 3

STATE OF HAWAII
DLNR/DOCARE

EXHIBIT # 1

PHOTOGRAPHIC RECORD

REPORT# ~~1109920~~

Classification : LAND USE: CDUA VIOLATION

Page 1 of 2 Pages

DATE/TIME: January 6 2003/1125hrs.

PHOTOGRAPHER: ~~XXXXXXXXXX~~

NUMBER OF PHOTOGRAPHS TAKEN: 21

CAMERA USED: Olympus C-2000 Digital

WEATHER: Clear, Sunny DAY xx NIGHT

PHOTOGRAPH #	DESCRIPTION
1	Photograph Depicts path cleared into the ocean at TMK: 1-5-010: 32. Path is approximately 16 feet wide.
2	Photograph Depicts path cleared into the ocean at TMK: 1-5-010: 32. Path is approximately 16 feet wide.
3	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32. Rocks are brown and appear to have been removed from an area that was wet.
4	Photograph depicts path cleared into the ocean at TMK: 1-5-010:32. Photograph was taken on the north side of the path facing southward.
5	Photograph depicts path cleared into the ocean at TMK 1-5-010:32. Photograph also shows a pile of rocks white rocks that appear to have been removed from ocean.
6	Photograph depicts path cleared into ocean at TMK: 1-5-010:32, taken from the top of the path from west to east. Path is approximately 70 feet long.
7	Photograph depicts path cleared into ocean at TMK: 1-5-010:32, taken from the middle of the path from west to east.
8	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32.
9	Photograph depicts rocks removed to create path to ocean at TMK: 1-5-010:32
10	Photograph depicts path cleared into into ocean at TMK: 1-5-010:32, taken from the middle of the path from east to west.
11	Photograph depicts hole dug into ground at TMK: 1-5-010:32. Hole is approximately 10 feet wide and 10 feet deep, and is located on the south side of the property.
12	Photograph depicts hole dug into ground at TMK: 1-5-010:32 in the foreground and in the background a pile of rocks and debris removed from the hole.

OFFICER: ~~XXXXXXXXXX~~ BADGE # 56 DATE/TIME: 5-01-03/1200hrs.
SUPERVISOR: Bryan Sugiyama DATE/TIME:

STATE OF HAWAII
DLNR/DOCARE

EXHIBIT # 1

PHOTOGRAPHIC RECORD

REPORT# [REDACTED]

Classification : LAND USE: CDUA VIOLATION

Page 2 of 2 Pages

DATE/TIME: January 6 2003/1125hrs.

PHOTOGRAPHER: [REDACTED]

NUMBER OF PHOTOGRAPHS TAKEN: 21

CAMERA USED: Olympus C-2000 Digital

WEATHER: Clear, Sunny DAY xx NIGHT

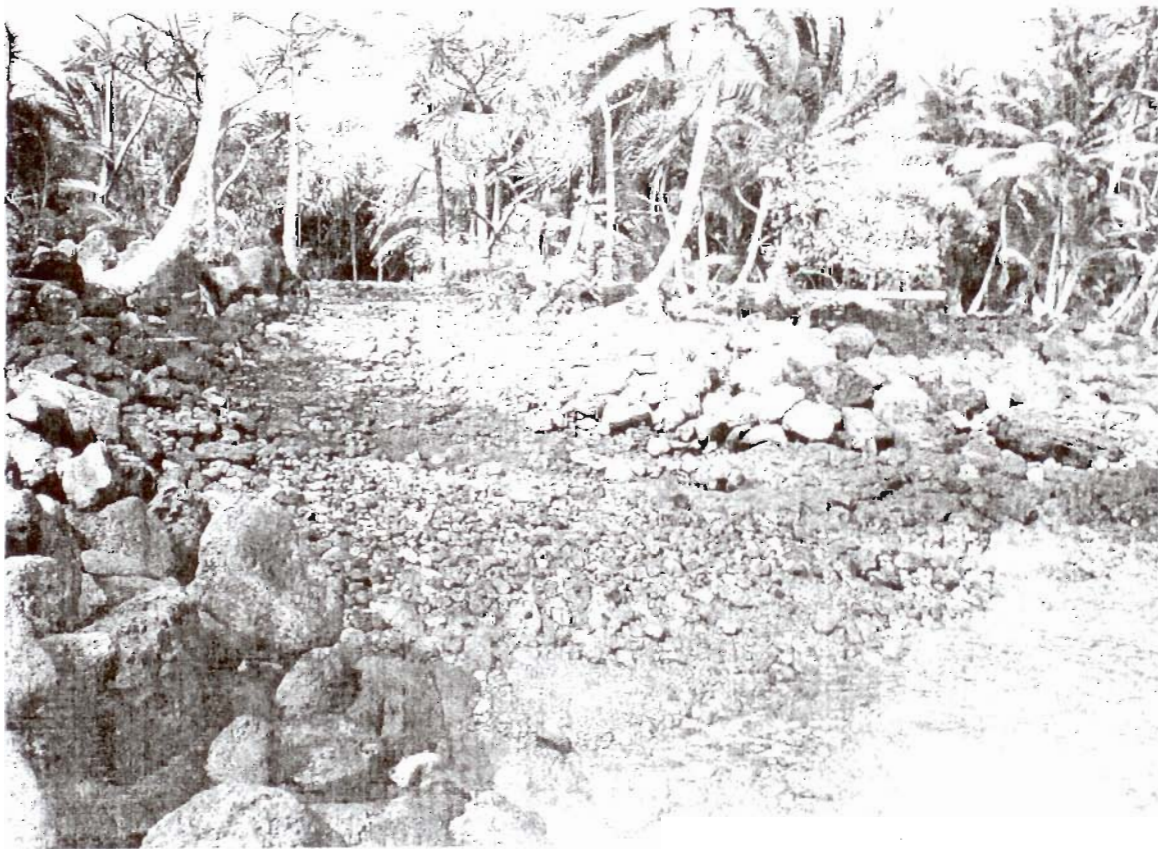
PHOTOGRAPH #	DESCRIPTION
13	Photograph depicts hole dug into ground at TMK: 1-5-010:32. Hole is approximately 10 feet wide and 10 feet deep, and is located on the south side of the property.
14	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the south to north. Cleared area is approximately 140 feet long and 75 feet wide.
15	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the south to north. Cleared area is approximately 140 feet long and 75 feet wide.
16	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from the north to south from approximately the middle of the cleared area.
17	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from south to north.
18	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from north to south.
19	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from north to south from approximately the middle of the cleared area on a rock mound.
20	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from west to east in the middle of the cleared area on a rock mound.
21	Photograph depicts cleared area of TMK: 1-5-010:32, photograph is taken from south to north in the middle of the cleared area on a rock mound.
22	Photograph depicts trees pushed to the west end of the cleared area of TMK: 1-5-010:32.

OFFICER: [REDACTED] BADGE # 56 DATE/TIME: 5-01-03/1200hrs.
SUPERVISOR: Bryan Sugiyama DATE/TIME:

Photograph 1



Photograph 2



Photograph 3



Photograph 4



Photograph 5



Photograph 6



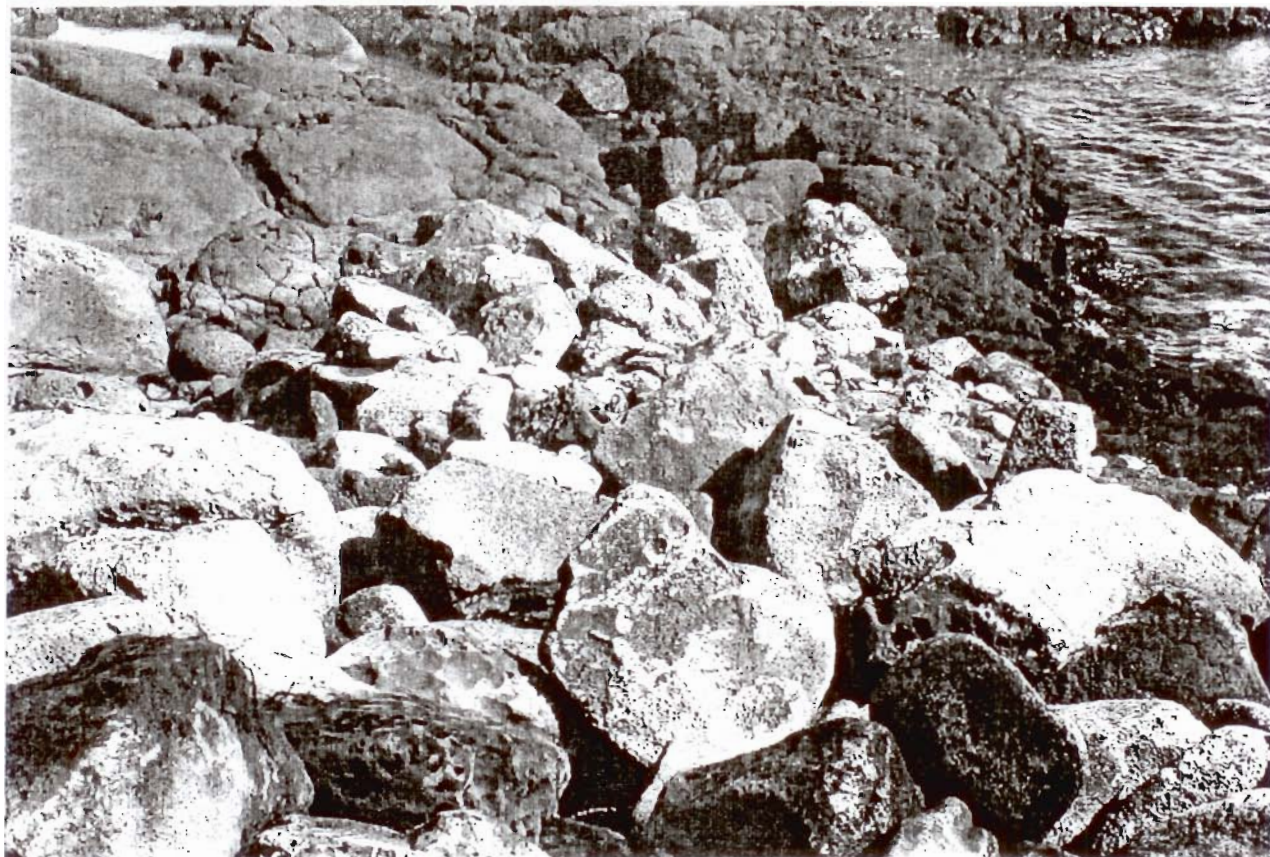
Photograph 7



Photograph 8



Photograph 9



Photograph 10



Photograph 11



Photograph 12



Photograph 13



Photograph 14



Photograph 15



Photograph 16



Photograph 17



Photograph 18



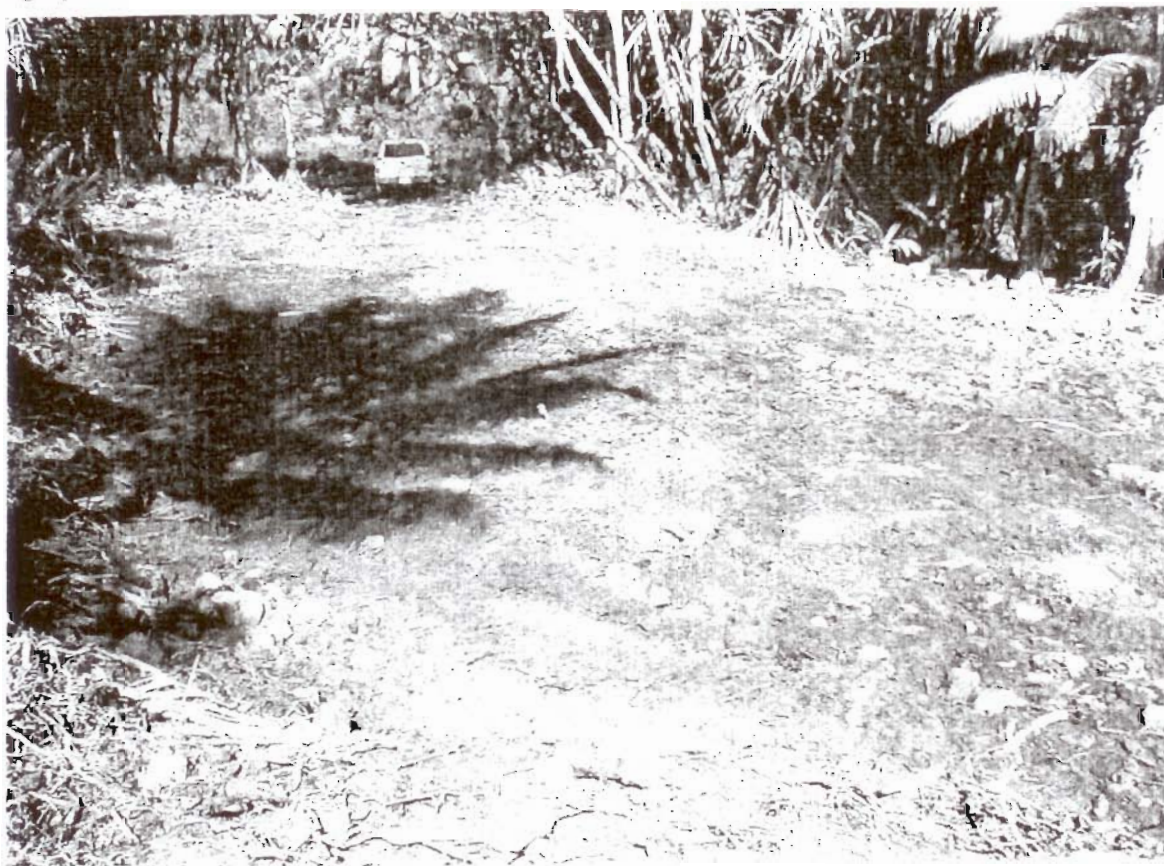
Photograph 19



Photograph 20



Photograph 21



Photograph 22





John & Maureen Gapp
PO Box 1128
Pahoa, HI 96778
808-966-9002

State Of Hawaii/Land Use Commission
Attention ;Sam Lemma
PO Box 2359
Honolulu, HI 96804

MAST
HA-03-96

January 27, 2003
Re: T-M-K :3-1-5-10-32

Dear Sam Lemma,

This is a follow up to our conversation last week regarding the work done on the property I purchased in December 2002, TMK 3-1-5-10-32.

I received a phone call from Jeffrey Darrow at the planning dept. that an anonymous complaint had been called in stating that grubbing was being done on a property located in the conservation area. I was very surprised by this phone call because I had gone to a lot effort to research the property and it seems I had repeatedly been given misinformation or in some cases limited information regarding what could and could not be done in this area. To date I have still not received anything but verbal information on what the limitations in a conservation area are. I will outline below the steps I took to investigate this property before I purchased it and after.

August 2002: I went to the Engineering Dept. and asked if the property was in a flood zone, the answer was no.

I then went over to the Planning Dept, and asked them to pull the map out which they did, I asked if I could build a single family home there. The answer, was I could build a single family home, but would not be able to do an Ohana. I could do a B&B possibly if I applied for a special permit. The gentleman also told me I could build within a hundred feet of the shoreline but, I would need to have a shoreline survey done. I told him I planned on building my home farther back than that, and he said not to worry about, it but if I changed my mind they would do the survey only once so not to do it till I was ready to build.

Sept. 24, 2002: We put an offer in on the property and soon after opened escrow.

★ **November 18, 2002:** I called the number in the phone book for the DLNR, and spoke with Anthony Ching and asked about the conservation zone and if I could get an interpretation of the boundary I told him I was purchasing the property and wanted to know more about it. He told me to fax my request, which I did.

★ **December 23, 2002 :** I received a map and short letter from DLNR stating that the conservation zone was approximately 300 feet from the shoreline. It was my understanding since no other information was sent that this referred to the distance from the shore, where we could build a single family home.

December 2002: Again in December while in the Planning dept. on other business I had the clerk pull out the map with our property on it and the clerk told me he and his wife often walked through the property to the tide pools on the shoreline and I jokingly told him that sometime next year we would be closing the road and he would have to walk in along the coast. Again there was no mention of SMA or State regulations regarding doing any ground work on the property.

EXHIBIT 5

January 3, 2003: I went to the engineering Dept. and gave them my TMK and asked if I would need a grubbing permit to do work on this property, I was told I would only if we were excavating greater than six feet down or moving more than 100 cubic yards.

★ < **January 4&5 2003:** We spent the weekend clearing the weeds, some Lahala, and Albeeziya trees, and in the area closest to the shoreline.

January 9, 2003: Phone call from Jeffrey Darrow regarding work down on our property.

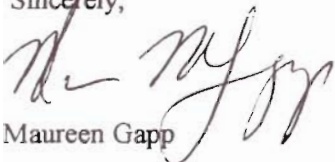
I have made numerous trips to the County to learn about this property including checking the property records at the tax office which showed there had been a home in the area we planned on clearing, and in fact we found and removed the trash left behind from this which included old beds, couches, and remnants of the plumbing. The property we purchased was until recently a 12 acre lot. The parcel was subdivided in to two lots. On the adjoining lot, an area less than 100 feet away from us, an equal size area had previously been cleared and is now just a flat area with grass on it. There is a Aqua Farm two lots over from us and a new home being built about a 1/8 of a mile down the road. All these things including a home previously there led me to believe I could grub and clear my property.

For a new landowner to approach so many County offices and the DLNR and not get the proper information shows a need for improvement on how to get the correct information to a new land owner. I was told by Jeffrey Darrow that although I asked many questions I failed to ask the right questions. This statement from him seems to me to be passing the blame because the system in place is faulty. I feel I made a good faith effort in obtaining as much information as possible concerning this property. The DLNR and or the county need to create a system possibly with the tax office so that when a property with restrictions is purchased the new owner is properly made aware of this. Especially if the restrictions are different from lot to lot on the same street and the same ocean.

★ [My husband and myself will be leaving the country on February 21, 2003. We will be going on a medical mission through New Guinea and the Solomon Islands by boat for the next 12-18 months. Not being here to clear this up makes this situation all the more frustrating. Since there is no ecological harm or harm to the public by clearing and grubbing such a small area on our property, this matter will have to be resolved upon our return. It is my hope that this case will encourage changes within an obviously faulty system and maybe changes can foster a better exchange of information between county and State offices.

Correspondence can be sent to PO Box 1128 in Pahoa. The mail will be forwarded to us every 2-3 months. I can be reached at the number listed above until I leave in February.

Sincerely,


Maureen Gapp

CC: Chris Yuen
Planning Director County of Hawaii

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. Box 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

DAN DAVIDSON
DEPUTY DIRECTOR FOR LAND

ERNEST Y.W. LAU
DEPUTY DIRECTOR FOR
THE COMMISSION ON WATER
RESOURCE MANAGEMENT

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND RESOURCES
ENFORCEMENT
CONVEYANCES
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE
COMMISSION
LAND
STATE PARKS

REF:PB:DH

Violation: HA-03-26

CERTIFIED/RETURN RECEIPT

APR 15 2003

Mr. and Mrs. John Gapp
13-1295 Kahukai Street
Pahoa, Hawaii 96778

Dear Mr. and Mrs. Gapp,

SUBJECT: Alleged Unauthorized Grubbing and Grading on Land Located within the Conservation District, Subject Parcel TMK: (3) 1-5-010:032

The Department is currently reviewing the alleged violation, regarding unauthorized grading and grubbing on land located within the State Land Use Conservation District. The Department will notify you when the issue will be scheduled before the Board of Land and Natural Resources meeting, at a time, date and location to be announced. In the meantime, you may wish to contact us to discuss these matters at your earliest convenience.

Please call Dawn Hegger of the Planning Branch at 587-0380, should you have any questions on this matter.

Very truly yours,

Dierdre S. Mamiya, Administrator
Land Division

7002 0510 0002 9969 3265

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
Postage \$	
Certified Fee \$	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	
Sent to: Mr. & Mrs. John Gapp 13-1295 Kahukai Street Pahoa, Hawaii 96778 City, State, ZIP+4	

Department

EXHIBIT 6



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON
DEPUTY DIRECTOR - LAND

ERNEST Y.W. LAU
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:PB:MM

Violation No. HA-03-26
Cor: HA-03-96

JUL 21 2003

John and Maureen Gapp
P.O. Box 1128
Pahoa, HI 96778

Dear Mr. and Mrs. Gapp:

Subject: Alleged Unauthorized Grubbing and Clearing on Conservation District Lands, TMK: (3) 1-5-010:032

The Office of Conservation and Coastal Lands is in receipt of your letter dated January 27, 2003 regarding alleged unauthorized grubbing and clearing in the resource subzone of the Conservation District at 47-141 Pulama Road, Kahalu'u, Hawaii.

Your letter notes you were given misinformation (or limited information) from the State and County of Hawaii despite numerous inquiries about what "could and could not be done in this area." The Department has no indication that you spoke with anyone in the Office of Conservation and Coastal Lands about identified land uses in the Resource subzone of the Conservation District.¹ The Department also doesn't know what information the various County offices gave you.

Your letter requests a resolution of this matter upon your return from travel abroad. As the landowners of the property where the alleged work was conducted, you should note that Chapter 13-5, Hawaii Administrative Rules (HAR) regulates land uses in the Conservation District. Under Chapter 13-5, Hawaii Administrative Rules, clearing or grubbing on Conservation District lands would require a CDUA, and the decision to permit the land use(s) would be at the discretion of the Board of Land and Natural Resources.

However, the Department recently sent you a letter, dated April 15, 2003, which noted we are currently reviewing the alleged violation, regarding the unauthorized grading and grubbing on land located within the State Land Use Conservation District. The

¹ We note that Anthony Chin is the Executive Director of the State Land Use Commission which is in a separate Department.

EXHIBIT 7

Department will notify you shortly to resolve this case through an administrative proceeding.

We hope this letter helps resolve some of the outstanding issues regarding your property. Please feel free to contact Matthew Myers, of the Office of Conservation and Coastal Lands at 587-0382.

Aloha,



Dierdre S. Mamiya
Acting Administrator
Office of Conservation
and Coastal Lands

Cc: Hawaii Board Member
Hawaii District Land Office
Chairperson's Office
DOCARE (Hawaii)



ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

REF:OCCL:DH

ENF: HA-04-28

John and Maureen Gapp
P.O. Box 1128
Pahoa, Hawaii, 96778

NOV - 2 2005

Dear Mr. and Mrs. Gapp,

SUBJECT: Enforcement File No. HA-03-26, Regarding Alleged, Unauthorized Grubbing and Grading, Tree Removal, Construction of Pathway, and Removal of Rocks on Subject Parcel TMK: (3) 1-5-010:035

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) has been waiting to hear from you to resolve Enforcement Case HA-04-28. The OCCL has been waiting to hear from you, upon your return to the State of Hawaii from your medical mission through New Guinea and the Solomon Islands. In your last correspondence with the department, dated February 3, 2003 (attached), you indicated you would return within 12 to 18 months from February 21, 2003 (approximately August 2004). More than a year has passed from this date. If you have returned to the state, please contact the office within two weeks of receipt of this letter.

The OCCL notes this matter will be placed on the Board of Land and Natural Resources (Board) agenda on Friday, January 13, 2006, which will commence at 9:00 AM, at the Kalanimoku Building, 1151 Punchbowl Street, Room 132, in Honolulu, Hawaii.

Please call Dawn Hegger of the Office of Conservation and Coastal Lands at 587-0380, should you have any questions on this matter.

Very truly yours,

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

c: Hawaii Branch DOCARE
Hawaii District Land Office
Hawaii County Planning Department
Mr. and Mrs. John Gapp
13-1295 Kahukai Street
Pahoa, Hawaii 96778

EXHIBIT 8

John & Maureen Gapp
PO BOX 1128
PAHAO, HI 96778
808-966-9002-PHONE
808-966-9007-FAX

J Hn: Dawn Hegger

FACSIMILE TRANSMITTAL SHEET

TO: Sam Lemmo	FROM: John Gapp
COMPANY:	DATE: 9-15-04
FAX NUMBER: 808 587 0322	TOTAL NO. OF PAGES INCLUDING COVER: 5
PHONE NUMBER:	
RE: T.M.K. 3-1-5-10-32	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

RECEIVED
OFFICE OF INFORMATION
2005 NOV -14 P 3:25

NOTES/COMMENTS:

Dawn,
This is the letter I sent
In Sept. 04. I did speak to you in
June 04 from Australia & then again in Aug 04
When I was back home, re: the Sept. 04 mtg.
my cell number here is 938-8677.

Thanks
Maureen Gapp

EXHIBIT 9

John & Maureen Gapp

PO Box 1128
Pahoa, HI 96778
808-966-9002 fax 808-966-9007

Sam Lemmo
State of Hawaii
DLNR
Office of Conservation and Coastal Lands
PO Box 621
HNL, HI 96809-0621
FAX - 808-587-0322

September 14, 2004

RE: Alleged unauthorized grubbing and grading on land located within the conservation district, parcel TMK (3) 1-5-010:032. Hearing date September 24, 2004

Dear Mr. Lemmo,

I am writing this letter to inquire as to whether or not the matter of the "alleged unauthorized grubbing and grading" can be handled without going through the Board. I have included my past correspondence to you to refresh your memory of our case. The meeting was rescheduled once and I was unable to get a refund on the air tickets for myself and my husband. The airfare alone to Oahu is approx. \$500 for us. I work as a nurse at Hilo Medical Center and the loss of wages is also considerable. It is an enormous burden for people on the outer islands to go to Oahu, to resolve matters that have occurred where we reside.

I still contend I was given wrong and misinformation in regards to the property. The grubbing that was done removed noxious weeds and weed trees (Balsa wood). We did not act out of malice. We ceased all work as soon as we were notified by Jeffrey Darrow, that were in violation of county and state rules and regulations. There was never any intent to do any harm to the area, we planned only to landscape it so we could access the property from the road on the property next to us. Our plan for the property is to simply build a single family home. Since Mr. Darrow informed us no work could be done on the property until the matter was resolved, we have stayed away from our own property. We sold our home to buy this property and are now having to rent a home, since we can't build on our property. The area that was cleared has since reverted back to its original overgrown state. I gave permission for the DOCARE officer to take photos of the property, if you need additional photos they can be provided. We are now aware of the procedure that must be complied with to build on the property and will of course follow them in the future.

On Sept. 8, 2004 I retraced my steps thru planning, property tax office and the DLNR office in the HILO State Office Building to see if things had changed. The changes were

few. The information given by the county is now more vague with instructions to "Go to the State Building". The county has changed the map of the area our property resides to a new white photo copy that has SMA written in red. This is suspiciously the only new page in the map book. I was told it had been recently revised. The Property tax office still has only conservation on the tax records and none of the clerks were aware of what SMA stood for. The only difference was at the DLNR office. This time instead of being told to "Call Oahu", I was given a Blue Book entitled "Conservation District Review, Identified Land Uses and Required Permits" Had I been given this book the first time I went there or Had Anthony Ching (Yes, I now know it was the wrong office), told me to get this book, this whole nightmare could have been avoided. This book very clearly tells what can be done and lists the correct phone numbers for information. It would be very helpful if this booklet were available at the county building as that is the first logical stop for most people seeking information regarding their property.

Again I sincerely hope this matter can be resolved through your department rather than a full board. We will make every effort to comply with any recommendation you make. Thank you for your time.

Respectfully,

The block contains two handwritten signatures. The first signature on the left is 'John Gapp' and the second signature on the right is 'Maureen Gapp'. Both are written in a cursive, flowing style.

John & Maureen Gapp



STATE OF HAWAII
DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM
LAND USE COMMISSION

P.O. Box 2359
Honolulu, HI 96804-2359
Telephone: 808-587-3822
Fax: 808-587-3827

December 10, 2002

Ms. Maureen M. Gapp
P. O. Box 1128
Pahoa, Hawaii 96778

HA-03-30

Dear Ms. Gapp:

Subject: BOUNDARY INTERPRETATION No. 02-42
Tax Map Key No: 1-5-10:32
Makuu, Puna, Hawaii

Pursuant to your facsimile transmittal dated November 18, 2002, requesting a boundary interpretation for the subject parcel, please be advised that we have determined an approximate location of the State Land Use (SLU) Agricultural/Conservation District boundary.

Our determination is based on review of the Commission's records and maps currently on file at our office. These included the official map H-71 (North Pahoa Quadrangle), the 1969 Land Use Districts and Regulations Review, the relevant tax map dated January 1967, and the following boundary interpretations for adjacent parcels previously issued by the Commission:

- June 24, 1974;
- July 18, 1985;
- August 6, 1990 (BINO #90-44);
- July 17, 1992 (BINO #92-32);
- June 10, 1997 (BINO #97-15); and
- February 20, 2001 (BINO #00-43).

Review of these pertinent materials indicated that the SLU Agricultural/Conservation District boundary was established pursuant to the 1969 Five-Year Boundary Review to preserve the scenic coastline. As reflected on the official map, to the south of the subject parcel, the boundary follows the mauka side (southern side) of the Government Beach Road easement. As the Government Beach Road extends northward to the subject parcel, the boundary then follows an average setback of 300 feet from the shoreline. A more precise location of the boundary in this area would require that a valid certified shoreline survey map be provided.

EXHIBIT. 10

Ms. Maureen M. Gapp
December 10, 2002
Page 2

We have enclosed a half-size copy of Tax Map 1-5-10 with an approximate SLU Agricultural/Conservation District boundary delineated for your reference.

Should you require clarification or further assistance, please feel free to call Fred Talon or Bert Saruwatari of my staff at 587-3822.

Sincerely,


ANTHONY J. H. CHING
Executive Officer

Enclosure: Boundary Interpretation Map dated December 10, 2002

- c: Gilbert S. Coloma-Agaran, BLNR Chairperson (w/enclosure)
Attn: Dierdre S. Mamiya, Land Division
Christopher Yuen, Planning Director, County of Hawaii Planning Department (w/enclosure)
Mike McCall Valuation Analyst, Mapping Section, Real Property Tax Division, County
of Hawaii (w/enclosure)

U.C.

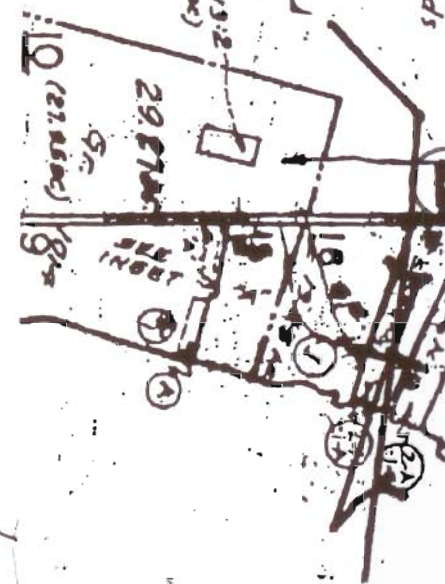
enlargement of
Subject parcel

Hawaiian Home Lands
464.5 ac.

AGRICULTURAL

PARCEL B

Gr. 1013.2
(11.38ac)



AGRICULTURAL

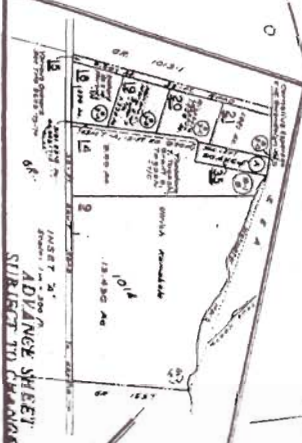
Frank Kamehale
P.O. Box 1000
Honolulu, Hawaii 96810

CONSERVATION

Boundary
Interpretation No. 02-42

The boundary as located, named and delineated is hereby certified as the actual Land Use District Boundary as required by the State Land Use Commission, Honolulu, Hawaii.

DEC 10 2002 by *William H. King*
Date Executing Officer



THIRD	DIVISION
ZONE	SEG. PLAT
1	5 10
CONTAINING	PARCELS

PRINTED JAN 12 2003

EXHIBIT 3 Boundary Interpretation # 02-42

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawaii

Ref. File No.:ENF OA-06-44

January 13, 2006

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

REGARDING: Alleged Unauthorized Construction of Shoreline Structure(s) at
Keehi War Memorial, Keehi Lagoon, Oahu

BY: Keehi Memorial Organization
2685 N. Nimitz Hwy
Honolulu, Hawaii 96819

LANDOWNERSHIP: State of Hawaii

LOCATION/
TMK: Keehi Memorial Park, Oahu
TMK: Seaward of (1)-1-1-003:04

SUBZONE: Limited

DESCRIPTION OF AREA:

The location of the alleged unauthorized land use is a shoreline area at Keehi Lagoon, Oahu (Exhibits 1-4).

ALLEGED UNAUTHORIZED LAND USES:

In July 2005, the DLNR, Office of Conservation and Coastal Lands (OCCL) staff received information regarding possible shoreline violations at the War Memorial Park, Keehi Lagoon, Oahu (Exhibit 1). OCCL staff conducted research to investigate the matter.

The project site is owned by the State of Hawaii and is overseen by the Department of Land and Natural Resources, State Parks Division. The memorial site is located on 11 acres at the north end of Keehi Lagoon at the mouth of Moanalua Stream. The property is located between the City and

County of Honolulu, Keehi Lagoon Beach Park and Moanalua Stream. The investigation revealed a new drainage canal built on the mauka portion and seawall placed along the bank to the south and continuing along the tidal stream bank to the east of the property (Exhibit 2 & 3).

There are 3 main alleged Conservation District violations to be considered:

1. Concrete Drainage canal (40' X 10') Built in 2000
2. Shoreline Structure A (Mauka Seawall) Built in 2004
3. Shoreline Structure B (Makai Seawall) Built in 2004

The Department of Land and Natural Resources has sufficient cause to enforce this matter since it is evident that a portion of the structure was constructed within submerged lands considered to be under the jurisdiction of the Board of Land and Natural Resources (Board) "conservation land" pursuant to Section 15-15-20(6), Hawaii Administrative Rules (HAR) (Exhibit 4).

The Department of Land and Natural Resources has jurisdiction over lands lying below the shoreline as evidenced by the "upper reaches of the wash of the waves other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves," (205A-1, definitions, Hawaii Revised Statutes) (Exhibit 5).

The Keehi Memorial Organization (KMO) is a tax-exempt 501(c)(3) organization that has retained a perpetual lease for the Keehi Lagoon Memorial property via the Pacific War Memorial Commission. The consultant for KMO has provided an encroachment packet to the DLNR for review of potential encroachments along the shoreline. The information presented has been utilized to help process the alleged violation

DISCUSSION

In 1999, the Board adopted the Hawaii Coastal Erosion Management Plan (COEMAP) and approved specific criteria to guide DLNR staff in the prosecution of cases involving unauthorized shoreline structures. In assessing cases involving unauthorized shoreline structures, specific criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. **Implement a "no tolerance" policy for recent or new unauthorized shoreline structures.**

The Department considers each case based on its specific circumstances/history. For instance, the age of the unauthorized structure, the quality of the surrounding beach resources, the nature of the surrounding development, and the risk to life and limb are all evaluated to help formulate a position with respect to the disposition of the matter.

Staff has considered the merits of the present case with respect to the Department and Board's criteria and finds that the structures should be removed. The wall and drainage were constructed without permits after the adoption of the "no tolerance" policy.

The structures are not thought to have a negative impact on the sandy beach and to adjacent down drift properties due to the existing conditions present at the site. However the board's "no tolerance" policy requires the structure be removed.

The primary concern with shoreline structures is the "locking up" of sediment resources that would normally be delivered to the beach through natural erosion. In this case, there is minimal to no sand in the littoral system and the area behind the seawalls is composed of dirt fill and would serve no practical benefit to allow this material to erode to the beach. In addition, the quality of the shoreline recreational resource is low due to the muddy nature of the stream mouth environment, diminished water quality, mangrove river bank and limited recreational opportunities.

It should be noted that the Board's criteria do allow staff to consider after-the-fact shoreline structures that have been in place for many years, but its "no tolerance" policy for newly constructed unauthorized shoreline structures dictates that this structure should be removed. In addition, it should be noted that the unauthorized shoreline structures were built onto the adjoining state-owned property.

RESOLUTION OF ALLEGED UNAUTHORIZED LAND USES

Title 13-5, Hawaii Administrative Rules:

The Department's Administrative Rules identify a list of uses that "may" be developed in the Conservation District, and also define land use as follows:

"The placement or erection of any solid material on land if that material remains on the land more than fourteen days.."

Since the shoreline structure qualifies as a land use under the definition of land use, a permit or approval of some type should have been obtained by the alleged.

FINDINGS:

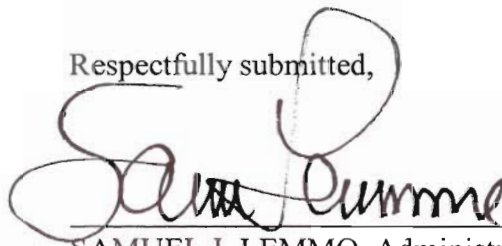
1. That the alleged did if fact, authorize or allow the construction of the structures;
2. That the structure does lie (partially) within the State Land Use Conservation District;
3. That the presence of the structures are NOT perceived to have negative impacts on beach processes in the immediate area on and adjacent shorelines including lateral access; and

4. That the structures were built within the last 5 years.

As such, staff recommends as follows:

1. That the Board of Land and Natural Resources finds that the alleged violated the provisions of Title 13-5 Hawaii Administrative Rules, and Chapter 183C, Hawaii Revised Statutes by failing to obtain the appropriate approvals for the construction of a shoreline structure;
2. That the Board of Land and Natural Resources impose a fine of \$2,000 pursuant to Chapter 183C, HRS;
3. That upon payment of the fine by the alleged, within sixty (60) days of the date of the Board's action, the alleged shall remove the structure and restore the shoreline area to its previous condition;
4. If the structure is not removed within sixty (60) calendar days, fines of \$2,000 per day shall accrue on the landowner until these conditions are met; and
5. That in the event of failure of the alleged to comply with items B and C, and D, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

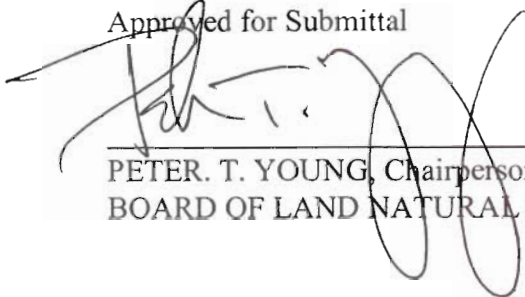
Respectfully submitted,



SAMUEL J. LEMMO, Administrator
Office of Conservation and Coastal Lands

Attachments

Approved for Submittal



PETER. T. YOUNG, Chairperson
BOARD OF LAND NATURAL RESOURCES

Exhibit 1. Location Map

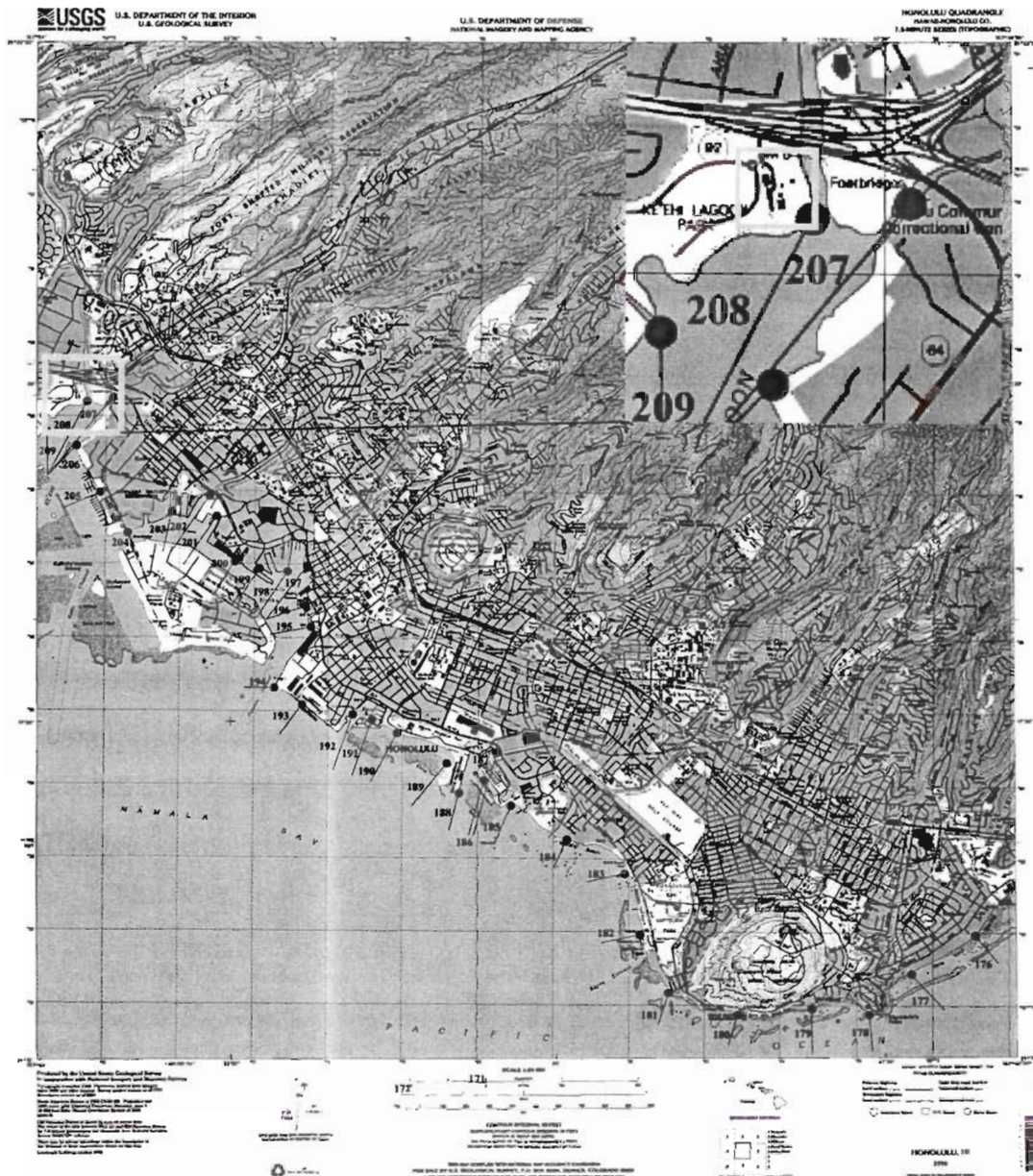


Exhibit 2. Site Map

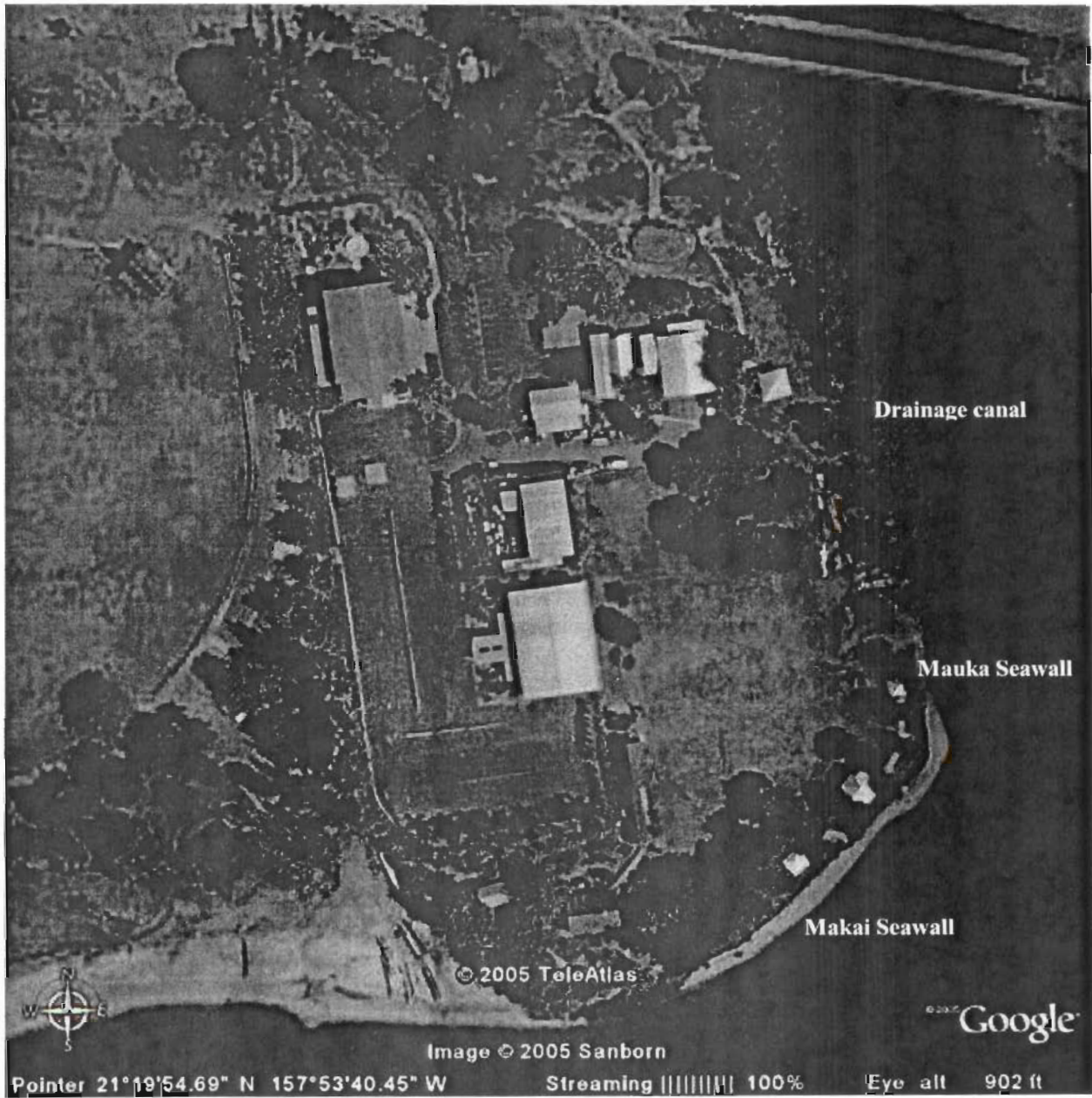


Exhibit 3. Subject Structure(s)

Ka'e'hi Lagoon Memorial

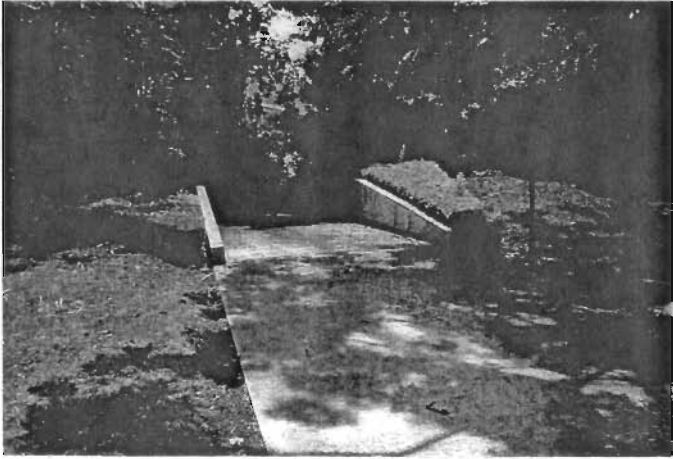


Photo #3 – Concrete Drainage Channel

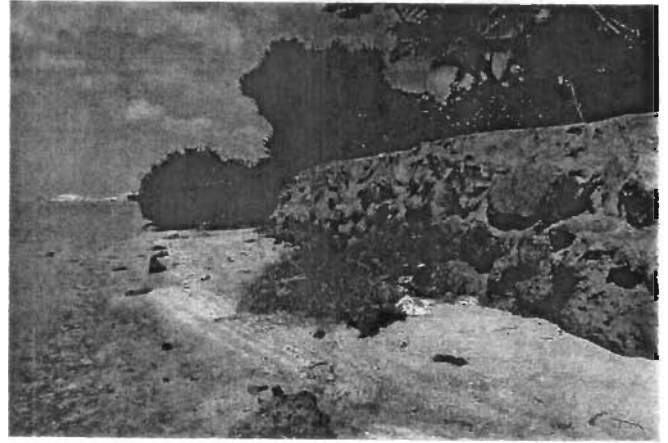


Photo #7 – Sea Revetment (makai, Keehi Lagoon on left)



Photo #4 – Sea Revetment (mauka)



Photo #8 – Sea Revetment (makai, Keehi Lagoon on left)

Exhibit 4.

HAWAII ADMINISTRATIVE RULES
TITLE 15
DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT, AND TOURISM
SUBTITLE 3 STATE LAND USE COMMISSION
CHAPTER 15
LAND USE COMMISSION RULES

§15-15-20 **Standards for determining "C" conservation district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "C" conservation district, the following standards shall apply:

- (1) It shall include lands necessary for protecting watersheds, water resources, and water supplies;
- (2) It may include lands susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the state and federal government, and lands necessary for the protection of the health and welfare of the public by reason of the land's susceptibility to inundation by tsunami and flooding, to volcanic activity, and landslides;
- (3) It may include lands used for national or state parks;
- (4) It shall include lands necessary for the conservation, preservation, and enhancement of scenic, cultural, historic, or archaeologic sites and sites of unique physiographic or ecologic significance;
- (5) It shall include lands necessary for providing and preserving parklands, wilderness and beach reserves, for conserving natural ecosystems of indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered, and for forestry and other related activities to these uses;
- (6) **It shall include lands having an elevation below the shoreline as stated by section 205A-1, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to section 501-33, HRS, unless otherwise designated on the district maps. All offshore and outlying islands of the State are classified conservation unless other designated on the land use district maps;**

Exhibit 5.

HAWAII REVISED STATUES

PART I. COASTAL ZONE MANAGEMENT

§205A-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Agency" means any agency, board, commission, department, or officer of a county government or the state government, including the authority as defined in part II;

"Coastal zone management area" means all lands of the State and the area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea;

"Coastal zone management program" means the comprehensive statement in words, maps, or other permanent media of communication, prepared, approved for submission, and amended by the State and approved by the United States government pursuant to Public Law No. 92-583, as amended, and the federal regulations adopted pursuant thereto, which describes objectives, policies, laws, standards, and procedures to guide and regulate public and private uses in the coastal zone management area, provided however the "coastal zone management program" is consistent with the intent, purpose, and provisions of this chapter;

"Land" means the earth, water, and air above, below, or on the surface;

"Lead agency" means the office of planning;

"Person" means an individual, corporation, or partnership, and an organization or association, whether or not incorporated;

"Public advisory body" means the advisory body established in section 205A-3.5;

"Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves. [L 1977, c 188, pt of §3; am L 1979, c 200, §1; am L 1983, c 124, §7; am L 1986, c 258, §2; am L 1987, c 336, §7; am L 1988, c 352, §4; am L 1989, c 356, §4; am L 1990, c 126, §7; am L 1993, c 91, §2; am L 1995, c 104, §4; am L 1996, c 299, §3; am L 2001, c 169, §2]

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawaii

File No.: MA-3103

January 13, 2005

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

REGARDING: Conservation District Use Permit Violation Regarding the Construction and Operation of a Wind Farm and Associated Facilities to Supply Wind Generated Electricity

APPLICANT: Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, Hawaii 96877
Contact: Mike Gresham

LANDOWNER: State of Hawaii under lease to Kaheawa Wind Power, LLC

**LOCATION/
TMK:** Kaheawa Pastures, Ukumehame, Maui
4-8-01:01 & 3-6-1:14

SUBZONE: General/Protective

BACKGROUND:

On January 24, 2003 the Board of Land and Natural Resources (BLNR) approved CDUA MA-3103 for a wind farm and associate improvements at Ukumehame, Maui, subject to 46 conditions (**Exhibit 1**). The CDUP was extended on December 3, 2005 such that project work must be initiated by January 24, 2007 and completed by January 24, 2011.

On May 23, 2005, Mike Gresham on behalf of Kaheawa Wind Power, LLC (KWP) wrote to the Office of Conservation and Coastal Lands (OCCL) requesting modifications to permit conditions contained in MA-3103 (**Exhibit 2**). Some of these modifications were approved by the BLNR on June 24, 2005 (**Exhibit 3**).

Construction plans for the access road were approved on August 29, 2005 and construction work was initiated on the access road on or around August 30, 2005.

On September 27, 2005 the Department issued a Notice and Order to cease all road construction (**Exhibit 4**). The reason for the stop work order was to investigate potential permit violations and to prevent a potential sedimentation event due to an impending rainstorm and any future rain storms (**Exhibit 5**). The alleged violation involved improper road construction and failure to contain earth material within the approved project alignment. Portions of the access road were widened to 30-feet. The approved plans allowed for a road width of 12 feet with some 16-foot sections. In addition, earth material (excess cut) from the excavation ended up on the down slope side of the road in a gulch (**See photos**).

As a result of this unauthorized action, the Department asked KWP to reduce the width of the road to the road width approved by the Department. On October 7, 2005, OCCL received a preliminary plan from KWP to reduce the road width. The plan was approved by DLNR on October 7, 2005 subject to seven (7) conditions and KWP was granted permission to initiate work (**Exhibit 6**). In addition to imposing a number of conditions, the letter stated that DLNR would process a violation case for the unauthorized fill that was pushed over the slope and into the gulch. The Department approved KWP's final plan on November 30, 2005 (**Exhibit 7**).

DISCUSSION:

Conservation District

Chapter 13-5, Hawaii Administrative Rules (HAR) and Chapter 183C, Hawaii Revised Statutes (HRS), regulate land uses in the Conservation District by identifying a list of uses that may be allowed by Conservation District Use Permit. The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained. Chapter 13-5, HAR defines "land use" in part as: the placement or erection of any solid material on land or the grading, removing or dredging of any material or natural resource on land.

Pursuant to Chapter 183C, HRS, the maximum fine for a Conservation District violation is \$2,000 per violation in addition to administrative costs, costs associated with the land and/or habitat restoration, if required, and **damages to state land**. After written or verbal notification from the Department, willful violation of this section may incur an additional fine of up to \$2,000 per day per violation for each day the violation persists.

Staff believes that there are two major violations. The first is related to the expansion of the access roadbed beyond the width of the approved construction plans. This constitutes a violation and subjects the permittee to a \$2,000 fine. The second is related to the spoiling of the slope and gulch with borrow material from the road cut. The permittee should be held responsible for damages to State land. Although it may not be possible to remove the cut material from the slope and gulch, due

to the technical difficulties and the likely hood of additional damages should this be attempted, staff believes that the State deserves to be compensated for the disturbance of these areas.

Toward this end, a penalty has been calculated based on the cost to remove the excess cut material from the slope. According to our Maui District Engineer this would cost approximately \$8,350, including equipment, supervisory and administrative costs (**Exhibit 8**).

In addition to these violations, staff believes that the permittee should pay administrative costs incurred by the Department to remedy the violations. Administrative costs for this case amount to \$8,350. This includes time and travel incurred by OCCL staff (\$500), DOFAW (\$500), DOCARE (\$250), Land (\$850), and Engineering (\$5,000).

The expenses for the Engineering section are significantly higher than other divisions due to the frequent presence of the DLNR District Engineer on site to provide oversight on construction practices. KWP agreed to this arrangement as a result of the unauthorized road work and even offered to pay for third party expenses should the need arise (**see Exhibit 6**).

Based on the preceding analysis, staff recommends as follows:

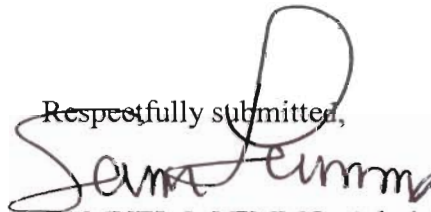
RECOMMENDATION:

That the Board of Land and Natural Resources find KWP in violation of Chapter 183C, HRS and Title 13-5, HAR for unauthorized road work and pushing earth material into a gulch, subject to the following conditions:

1. The permittee violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in two (2) instances by failing to obtain the appropriate approvals for unauthorized road widening and for the spoiling of the slope and gulch with borrow material from the road cut. The permittee is fined a total of \$2,000 for the road widening and \$8,350 for the spillage on the slope and gulch;
2. The permittee is fined an additional \$7,100 for Departmental administrative costs associated with the subject violations;
3. The permittee shall pay all fines (**total \$ 17,450**) within thirty (30) days of the date of the Board's action;
4. That in the event of failure of the permittee to comply with any order herein, the permittee shall be fined an additional \$2,000 per day until the order is complied with; and

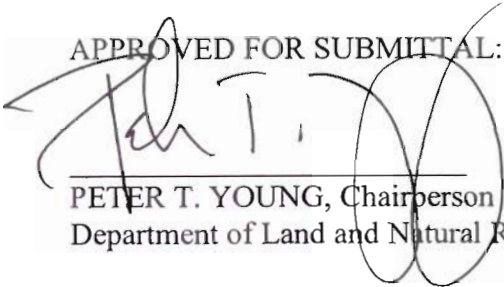
5. That in the event of failure of the permittee to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including administrative costs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sam Lemmo", written over a light gray rectangular background.

SAMUEL J. LEMMO, Administrator

APPROVED FOR SUBMITTAL:

A handwritten signature in dark ink, appearing to read "Peter T. Young", written over a light gray rectangular background.

PETER T. YOUNG, Chairperson
Department of Land and Natural Resources



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P.O. Box 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON

ERNEST LAU
DEPUTY DIRECTOR

DEAN A. NAKANO
ACTING DEPUTY DIRECTOR FOR
THE COMMISSION ON WATER
RESOURCE MANAGEMENT

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND RESOURCES
ENFORCEMENT
CONVEYANCES
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND
STATE PARKS

Date: 2/7/03

Ref.:PB:SL

File No.:MA-3103

Mr. David Kirkpatrick
Director of Northwest Commercial Origination
GE Wind Energy
13000 Jameson Rd.
Tehachapi, CA 93561

Dear Mr. Kirkpatrick:

Our January 31, 2003 letter informing you of the Board's action on your Conservation District Use Application for a windfarm at Ukumehame, Maui contained another error. Condition 10 identified Hawaii Wind Energy, LLC as the party responsible for compliance with the provisions of a Fire Contingency Plan. The condition has been corrected to identify GE Wind Energy as the responsible party. We are herein providing you with an amended letter with the corrected condition.

This is to inform you that on January 24 2003, the Board of Land and Natural Resources approved your application to construct and operate a 20 megawatt wind farm and associated improvements at Kaheawa Pastures in Ukumehame, Maui, (TMK: 4-8-01: 01), subject to the following conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules and regulations of the Federal, State, and County governments, and applicable parts of Section 13-5-42, Hawaii Administrative Rules;
2. The applicant shall comply with applicable Department of Health administrative rules;
3. All mitigative measures proposed in the final Environmental Impact Statement for the project shall be implemented;

EXHIBIT

4. The applicant shall install the wind turbines to minimize visual impacts to the view planes along the Old Lahaina Pali Trail. The applicant shall work with the Na Ala Hele program to implement the mitigation measures they suggest on page 10 of the staff report;
5. The applicant shall conduct a follow-up archaeological survey if the course of the upper spur road is altered;
6. Heiau 5232 at Ukumehame will need to be preserved. A preservation plan (scope of work) will need to be submitted to the State Historic Preservation Division for review and acceptance. This plan will need to identify buffers around the site, interim protection measures, and long-term preservation measures. The Division will also need to verify that the plan has been successfully carried out, prior to land alteration, or alternatively construction activities may commence following written verification from our Division that the interim preservation measures are in place. Also, as a protective measure, orange construction fencing shall be placed along both sides of the existing access road where it intersects with the Lahaina Pali Trail (State Site 50-50-09-2946 and 50-50-09-2950). The State Historic Preservation Division (Dr. Melissa Kirkendall, 243-5169) will need to verify that the protective construction fencing is in place, prior to any land alterations;
7. If evidence of historic sites or subsurface features, including burials, are discovered during construction, all activity in the vicinity of the find shall cease and the applicant shall contact the State Historic Preservation Division at 692-8015;
8. All activities connected with the project shall be contained within the project area as identified in the application for a CDUP and the final EIS;
9. The applicant shall take appropriate measures to mitigate the impacts of erosion and siltation, and prevent oil, fuel, or cement products from falling, blowing, or flowing on Conservation lands and ocean waters. All work will be scheduled during periods of low rainfall;
10. Prior to construction, the Applicant shall submit a Wild land Fire Contingency Plan approved by the Division of Forestry and Wildlife for all phases of the project. The plan shall be completed in accordance with the suggestions on page 9 of this staff report. All personnel of GE Wind Energy and the contractor involved with this project shall comply with the provisions of the Fire Contingency Plan. A copy of the plan shall be filed with the Land Division. The applicant will be liable for all fires determined by DLNR to have been caused or started from management activities related to the project. Also, DOFAW may inspect the site at any time upon request;

11. All construction materials shall be removed from the project site and disposed of at a landfill site approved by the County of Maui. Additionally, the applicant shall remove any trash or debris from the site upon completion of the project;
12. The applicant shall obtain the appropriate authorization through the Maui District Land Office, Department of Land and Natural Resources, for the use of State lands;
13. The final construction plans, including improvements to the access road network and locations of the site operations and maintenance building and site substation shall be coordinated with the Maui District Land Agent, the Historic Preservation Division, and the Division of Forestry and Wildlife;
14. The applicant shall provide four (4) sets of the final construction plans and specifications to the Chairperson or his authorized agent for approval with the permit declarations set forth in the permit application and the final EIS. Three (3) sets of plans will be returned to the applicant. Plan approval by the Chairperson does not infer approval required by other agencies;
15. Any work to be done on the land shall be initiated within two (2) years of the approval of the use by the Board, and all work and construction must be completed within four (4) years of the approval by the Board;
16. The applicant shall notify the Department in writing when construction is initiated and when construction is completed;
17. If any information or data provided by the Applicant prove to be false, incomplete or inaccurate, this permit may be modified, suspended, or revoked. The Department may, in addition, institute appropriate legal proceedings;
18. Where any polluted run-off, interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the polluted run-off, interference, nuisance, harm, or hazard;
19. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
20. All cleared areas shall be revegetated within thirty days, using native species found in the area;

21. During construction and the initial operational period of the windfarm, the applicant, in consultation with DLNR, Division of Forestry and Wildlife staff, shall monitor wildlife to ensure that the wind turbines and their towers are not sources of mortality to endangered birds, such as the Nene, the Dark-rumped Petrels, or to the endangered Hawaiian hoary bat. The type and frequency of monitoring periods shall be coordinated with the Division of Forestry and Wildlife, Department of Land and Natural Resources. The applicant shall make arrangements with the DLNR, Division of Forestry and Wildlife to pay for the cost incurred by all monitoring;
22. The applicant shall implement their Downed Bird Protocol and shall be required to immediately notify the USFWS and DOFAW if any injured or dead birds or bats are found, and the location of possible strikes. The applicant shall pay for the cost incurred by this effort;
23. The applicant shall continue opportunistic surveys of bird. Specific sightings shall be documented via a standard bird observation form;
24. The applicant shall inspect, in coordination with the DLNR, Division of Forestry and Wildlife, turbine sites to insure that no bird nests are present in the immediate area of the proposed tower foundation and access road;
25. The applicant shall work closely with DLNR, Division of Forestry and Wildlife staff to manage the wildlife habitat. This will include periodic removal of rubbish. If necessary, this will include trapping to control the number of unwanted mammals, e.g., rats, mongoose, feral cats and dogs. The applicant shall implement additional mitigation measures to protect native habitat as suggested on page 11 of this staff report;
26. The applicant shall contribute \$3,500 annually to DLNR's Nene Propagation and Recovery Program;
27. The applicant shall develop an education and observation program, including a bird identification primer and format for documenting specific observation;
28. If for any reason, the project is terminated or GE Wind Energy enters bankruptcy proceedings, the responsibility for the removal of all facilities and equipment associated with the project shall remain with GE Wind Energy, and the area is to be restored to the satisfaction of the Department of Land and Natural Resources;
29. The Applicant shall allow State and/or Federal biologists access to the site to perform periodic checks for bird and mammal mortalities;
30. Prior to construction, all access road and site construction plans shall be reviewed and approved by the County of Maui Department of Public Works and the Department of Transportation, Highways Division;

31. The applicant shall minimize ground disturbance to reduce the potential for soil erosion in and around the gulches;
32. The applicant shall add, and replace as necessary culverts to handle anticipated water flows in the gulches;
33. The applicant shall add channels or troughs along sections of the access road network to divert water flows and prevent soil erosion;
34. The applicant shall use gravel or other porous materials to maintain the integrity of the roadbed;
35. The applicant shall do additional botanical surveys as represented in the accepted EIS for the project;
36. The applicant shall hire a plant expert to supervise the actual construction work in areas in or near where there are native plants;
37. The applicant shall establish an inspection station at the staging area near the main highway to reduce the possibility of introducing alien plant species to the site, prior to the initiation of project work. Each vehicle will be inspected prior to traveling the jeep road up to the site;
38. The applicant shall ensure that operations and maintenance staff do not damage native plants. If construction or operation required the removal of native plants, the plants will be removed, relocated and replanted. The applicant shall pay for the cost of this effort;
39. The applicant shall work with plant experts to introduce appropriate native plant species back into the Kaheawa Pastures;
40. The applicant shall work with the County of Maui Planning Department to ensure that the appropriate colors tones are used on the towers and blades;
41. That this approval provides for the subdivision of Conservation District lands, if necessary, to accommodate the windfarm and access road;
42. The applicant shall comply with the Incidental Taking Permit requirements of the U.S. Fish and Wildlife Service, including the preparation of the Habitat Conservation Plan;
43. The applicant shall submit a pre-final construction plan for the wind turbines as well as hire a color consultant to develop the most appropriate color scheme for the project to blend in with the surroundings. The color scheme shall be reviewed by the County of Maui for consistency with its programs and policies;

44. That failure to comply with any of these conditions shall render this Conservation District Use Permit null and void; and
45. All other terms and conditions as prescribed by the Chairperson.

Please acknowledge receipt of this permit, with the above noted conditions, in the space provided below. Please sign two copies, retain one, and return the other within thirty (30) days of the date of this letter.

Should you have any questions on any of these matters, please feel free to contact Sam Lemmo of our Planning Branch staff, at 587-0381.

Aloha,



Dierdre S. Mamiya, Administrator

Receipt acknowledged

Signature

Date

cc: Chairman's Office
Maui Board Member
Maui Land Agent
County of Maui Planning Department
DOFAW
DOCARE
HPD
Warren Bollmeier
USFWS

May 23, 2005

Mr. Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawai'i 96809-0621

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2005 MAY 25 P 12:51
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Dear Mr. Lemmo,

RE: Kaheawa Pastures Wind Farm
Ukumehame, Maui, Hawai'i
TMK No. (2) 4-8-001: portion of 001
File No. MA-3101

As you know, throughout the development of this project we have paid special attention to the permit conditions so that we could comply fully with their intent. During this time, we have also invested significant dollars and conducted additional technical surveys (botanical, archaeological, wildlife, GPS, etc.); we have also spent considerable time with the various agencies. As a result of all of this work, we have gathered valuable information regarding the site. We are now at the stage of finalizing plans for the commencement of construction and we believe that some of the permit condition language could be clarified to be more concise and unambiguous in the context of what we know today.

In order for Kaheawa Wind Power, LLC (KWP) to comply with the original intent of the conditions and make compliance an objective exercise for both the project sponsors and your Office, it behooves us to refine the language of several of the permit conditions. Several of those permit conditions no longer make sense, given the new survey data, and should be deleted, while a few others can be strengthened to provide a more direct benefit to the concerned agency.

The following is our request for changes in the permit condition language. We assume that a board appearance will be necessary and we therefore request that you schedule this item as soon as possible. In each case I have supplied the original language, some background information and then our proposed new language. (These have also been categorized to facilitate their review.)

Botanical Permit Conditions

There are several permit conditions that concern the plant species in the vicinity of the improvements to be constructed. At the time the permit conditions were written, complete botanical surveys of these areas had not been conducted. There was concern that there were rare or endangered native plant species that would be negatively impacted by the project's development. KWP has since conducted complete botanical surveys as required in condition 35. These surveys are attached to this letter as Exhibits A and B.

The results of the botanical surveys indicate that no endangered or threatened plants are found in the surveyed areas; and while some native plants are in these areas, they are abundant on adjacent ridges or in other locations on the island or in the State. Please note that when looking at the "abundance" column in the report, it specifically references "site abundance" and not general abundance of the species.

It is widely known that the largest concentration of native plants can be found at higher elevations. This has been confirmed by our botanist. KWP has already greatly mitigated the impact to these native plants by rerouting the access road to the site, taking a lower elevation route with lower overall impact on native vegetation. This low impact route eliminates just over two miles of potential disruption to native plants by avoiding additional road improvements and by avoiding higher elevations altogether.

Following are the permit conditions associated with the botanical elements of the project.

Original language: *20. All cleared areas shall be revegetated within thirty days, using native species found in the area;*

This permit condition should be deleted or amended. To carry out this condition would be contrary to the need and method of protecting the Nene. For example, if native plants are planted in a cleared area at or near the base of a turbine tower, it may provide an attractive foraging and/or nesting site for the Nene. The proximity would then increase the potential for a bird strike. In addition, the fire contingency plan required in condition number 10 requires a cleared buffer zone around most of the project components. The fire contingency plan attached as Exhibit C is awaiting final approval from the Administrator of the Division of Forestry and Wildlife.

Proposed New language: *20. All cleared areas shall be revegetated in a manner consistent with other permit conditions, with specific consideration given to the fire contingency plan and the Habitat Conservation Plan. Any necessary revegetation shall be completed within thirty days of commencement of turbine operations, using native species found in the area.*

Original language: *36. The applicant shall hire a plant expert to supervise the actual construction work in areas in or near where there are native plants;*

This condition should be deleted and its intent should be incorporated with other conditions (see below). First, the condition is not specific about what the expert should do. Second, now that we have complete survey information on the plant species in the area, we know that none of the plants impacted by construction is endangered.

Original language: 38. *The applicant shall ensure that operations and maintenance staff do not damage native plants. If construction or operation required the removal of native plants, the plants will be removed, relocated and replanted. The applicant shall pay for the cost of this effort;*

The first sentence is appropriate, but the second sentence does not seem warranted given the survey information and relative local abundance of the native plants. We have located a community group that is interested in transplanting some of the native plants from this area into another area on Maui. While not necessary from a conservation standpoint, we think that an action like that would satisfy the intent of the original permit condition. See proposed new language below.

Original language: 39. *The applicant shall work with plant experts to introduce appropriate native plant species back into the Kaheawa Pastures.*

Proposed new language for conditions 36, 38 and 39: 38. *The applicant shall offer local community groups the opportunity to remove and relocate native plants that will be affected during the construction of the project. The applicant shall cooperate with community groups to reintroduce native plants to the project area in a manner consistent with the fire contingency plan, the Habitat Conservation Plan and other conservation requirements that may occur. The applicant shall ensure that operations and maintenance staff do not damage native plants.*

Construction and Construction-Related Permit Conditions

Most of the construction-related permit conditions are clear and provide direction for the applicant. To ensure the proper standard of care for the access road and project site, and to eliminate confusion or redundancy, one or two conditions should be reworded or deleted.

Original Language: 9. *the applicant shall take appropriate measures to mitigate the impacts of erosion and siltation, and prevent oil, fuel, or cement products from falling, blowing, or flowing on Conservation lands and ocean waters. All work will be scheduled during periods of low rainfall;*

The best way to quantify what "appropriate measures" are is for the applicant to get a National Pollutant Discharge Elimination System (NPDES) permit. The permit will establish the standard of care for all the construction work. Several of the conditions appear to have anticipated that this permit would be required, although this permit is not specifically referenced. We understand the risks of construction during heavy rainfall or

other conditions that may be harmful to the environment. With a NPDES permit in place, all weather conditions will be considered, not just an undefined rainy period. The permit will provide the needed definition to heavy rainfall or 'low rainfall' and other hazardous conditions. The 'low rainfall' language should be deleted in the condition so as not to cause confusion of interpretation. When the NPDES permit is required, then several other similar permit conditions surrounding construction fall into place.

Proposed New Language: 9. *The applicant shall obtain and comply with the requirements of a NPDES permit pursuant to HAR 11-55, Appendix C to mitigate the impacts of erosion and siltation, and prevent oil, fuel, or cement products from falling, blowing, or flowing on Conservation lands and ocean water;*

Original Language: 11. *All construction materials shall be removed from the project site and disposed of at a landfill site approved by the County of Maui. Additionally, the applicant shall remove any trash or debris from the site upon completion of the project;*

Since landfills are permitted by the State and not the County, this permit condition language should change to reflect the law, and to make sure the materials are disposed of properly.

Proposed New Language: 11. *All construction materials shall be removed from the project site and disposed of at a landfill site ~~approved by the County of Maui.~~ permitted by the State of Hawaii. Additionally, the applicant shall remove any trash or debris from the site upon completion of the project.*

Original Language: 13. *The final construction plans, including improvements to the access road network and locations of the site operations and maintenance building and site substation shall be coordinated with the Maui District Land Agent, the Historic Preservation Division, and the Division of Forestry and Wildlife;*

Since condition 14 referenced below relates to the approval of plans, condition 13 should clearly relate to the delivery of 'as built' plans (at the end of construction) to each division for their records. If this is not the intent of condition 13, then it should be deleted to avoid confusion with condition 14.

The other possible intent of this condition is for the applicant to 'coordinate' the construction plans with these divisions. If that is the intent of this condition it should be deleted. It is beyond the authority of the applicant to coordinate any activities of these agencies. The requirements of these agencies are being met in several other conditions.

For example, the position of Maui District Land Agent is not currently staffed. However, the plans will be reviewed in Honolulu under condition 14.

Already submitted to the SHPD are the preservation plan as required in condition 6, and the additional surveys as required in condition 5. In addition, an inventory survey will soon be completed for the entire project site and access road, including the area within the Special Management Area. This is a notably higher level of archaeological review than required in the permit conditions. Therefore, because other permit conditions require appropriate submittals to SHPD, no purpose would be served by including SHPD in construction-related conditions.

With regard to the Division of Forestry and Wildlife, we have submitted a fire contingency plan as required in condition 10, and have undertaken the Habitat Conservation Plan as required in condition 21.

A reasonable approach would be to delete this condition as redundant. Another possibility is to change the wording if the intent was to provide these divisions with as built drawings.

Proposed New Language: 13. *The final 'as built' construction plans, including improvements to the access road network and locations of the site operations and maintenance building and site substation shall be coordinated delivered to the Maui District Land Agent, the Historic Preservation Division, and the Division of Forestry and Wildlife.*

Original Language: 14. *The applicant shall provide four (4) sets of the final construction plans and specifications to the Chairperson or his authorized agent for approval with the permit declarations set forth in the permit application and the final EIS. Three (3) sets of plans will be returned to the applicant. Plan approval by the Chairperson does not infer approval required by other agencies;*

Time is always of the essence in a construction project. This condition requires approval by the DLNR. In fairness to the applicant, there should be some guidelines for DLNR's review and approval. Additionally, we question whether the DLNR is interested in review of detailed construction plans for such elements as electrical system components, foundation design, etc.; particularly when 'as-built' sets of such documents will be submitted pursuant to condition 13 above. It seems the DLNR's interest would be best served by submittal of a site plan reflecting the overall arrangement of project elements. We suggest the following addition to the condition language.

Proposed New Language: 14. *The applicant shall provide four (4) sets of the final site construction plans and specifications to the Chairperson or his authorized agent for approval with the permit declarations set forth in the permit application and the final EIS. Three (3) sets of plans will be returned to the applicant. Plan approval by the Chairperson does not infer approval required by other agencies. All substantive comments, if any, shall be transmitted to the applicant within 30 calendar days of submittal or within 15 days of any resubmittal. Approval shall not be unreasonably withheld.*

Original Language: 30. *Prior to construction, all access road and site construction plans shall be reviewed and approved by the County of Maui Department of Public Works and the Department of Transportation, Highways Division;*

We have consulted the County Department of Public Works and Environmental Management, which has indicated that it does not need to review these construction plans. We have also contacted the State Department of Transportation (DOT), which also does not want to review these plans. However, the DOT will require a driveway permit for the entrance to the access road from Honoapiilani Highway.

Therefore, condition 30 should be deleted, or at the least the language modified.

Proposed New Language: 30. *Prior to construction, all access road and site construction plans shall be reviewed and approved by the County of Maui Department of Public Works and the Department of Transportation, Highways Division, as necessary according to their individual jurisdictions and/or policies;*

Wildlife Permit Conditions

Permit conditions 21, 22, 23, 24, 25, 26 and 27 are redundant and will be addressed in great detail by compliance with permit condition 42, which is the preparation of the HCP. At the time the permit conditions were drafted, the scope of the HCP had not yet been clearly defined, and as far as we know no one had completed a HCP in the State of Hawaii at that time. As we are learning, the creation of a HCP is a complex and expensive undertaking for the applicant. The HCP easily and substantively covers all the aspects of these seven permit conditions. The Division of Forestry and Wildlife will surely concur that all possible wildlife considerations are being addressed in this plan. Again, for ease of compliance and to avoid confusion, we request that these six conditions be deleted and supplanted by condition 42.

Listed here for reference only:

21. *During construction and the initial operational period of the windfarm, the applicant, in consultation with DLNR, Division of Forestry and Wildlife staff, shall monitor wildlife to ensure that the wind turbines and their towers are not sources of mortality to endangered birds, such as the Nene, the Dark-rumped Petrels, or to the endangered Hawaiian hoary bat. The type and frequency of monitoring periods shall be coordinated with the Division of Forestry and Wildlife, Department of Land and Natural Resources. The applicant shall make arrangements with the DLNR, Division of Forestry and Wildlife to pay for the cost incurred by all monitoring;*

22. *The applicant shall implement their Downed Bird Protocol and shall be required to immediately notify the USFWS and DOWFAW if any injured or dead birds or bats are found, and the location of possible strikes. The applicant shall pay for the cost incurred by this effort;*

23. The applicant shall continue opportunistic surveys of bird. Specific sightings shall be documented via a standard bird observation form;

24. the applicant shall inspect, in coordination with the DLNR, Division of Forestry and Wildlife, turbine sites to insure that no bird nests are present in the immediate area of the proposed tower foundation and access road;

25. the applicant shall work closely with DLNR, Division of Forestry and Wildlife staff to manage the wildlife habitat. This will include periodic removal of rubbish. If necessary, this will include trapping to control the number of unwanted mammals, e.g., rats, mongoose, feral cats and dogs. The applicant shall implement additional mitigation measures to protect native habitat as suggested on page 11 of this staff report;

26. The applicant shall contribute \$3,500 annually to Diner's Nine Propagation and Recovery Program;

27. the applicant shall develop an education and observation program, including a bird identification primer and format for documenting specific observation;

Original Language: *42. The applicant shall comply with the Incidental Taking Permit requirements of the U.S. Fish and Wildlife Service, including the preparation of the Habitat Conservation Plan;*

This simple permit condition turns out to be much more complex than it first appears. It is an extremely expensive and onerous undertaking for the applicant. It is however one that we support and must be done to provide the necessary protections for the endangered species that may or may not be impacted by the project.

We began the process in July of last year by sponsoring a site visit by the Endangered Species Recovery Committee. We have since invested a great amount of time and money to create a plan; our costs will exceed \$200,000 by the time the permits are actually issued. More importantly, we will likely invest more than a \$1,000,000 over the life of the plan providing various kinds of mitigations, including research and surveys. Today no one knows what impact the project will have on these species, but the plan provides for the worst case and best case scenario. I suspect this project will provide more net benefit for the species than all other projects combined have to date.

Even though we began the process last July, the HCP will take so long to complete we are running into a timing problem. Our lenders see the process as discretionary and therefore have given us a deadline by which we must have the licenses. As it stands today we will not make that deadline. The plan has been complete for some time, but it must be reviewed by the state and federal agencies. Then there are publication periods, and then further approval actions. By the time all this is complete we will be in default and the funding will

stop. What we need is the Board to make the permit condition voluntary again as it is under the law.

This is a complicated subject and I will provide a more thorough position paper for the Board members prior to our appearance. While we will complete the HCP and obtain our licenses, we would like to change the language of this condition to accommodate the project lenders. This will certainly require more discussion to find a solution, but following is the language change we propose.

Proposed New Language: 42. *The applicant shall comply with the Incidental Taking Permit requirements of the U.S. Fish and Wildlife Service, including the preparation of the Habitat Conservation Plan (HCP) by the commencement of commercial operations. If the HCP is not completed by commencement of commercial operations the applicant may pay the state Division of Forestry and Wildlife a lump sum payment of \$200,000 for research and mitigation purposes and have no further obligation to complete the HCP.*

Miscellaneous Permit Conditions

Original Language: 4. *the applicant shall install the wind turbines to minimize visual impacts to the view planes along the Old Lahaina Pali Trail. The applicant shall work with the Na Ala Hele program to implement the mitigation measures they suggest on page 10 of the staff report;*

The staff report of January 24, 2003 contains comments from Na Ala Hele Program staff. Then-applicant General Electric (GE) discussed possible mitigation but no specific mitigation is recommended.

When KWP was required to conduct a visual impacts Environmental Assessment in August of 2004, the Na Ala Hele Program was one of the consulted agencies. Discussions were held with Ms. Torrie Nohara about the agency's prior concerns as well as current concerns. There was agreement that there would be an unavoidable visual impact, and so the discussions led to several possible mitigation measures or contributions that could be made to enhance the Na Ala Hele trail experience. As discussed in the staff report of January 2003 by GE, one mitigation activity seems to stand out as a tangible contribution to the trail program. Ms. Nohara indicated that only limited funds were available to print trail brochures. KWP proposes to contribute \$1,500 to the Na Ala Hele program, specifically for the production of the Lahaina Pali Trail brochure, and will participate in providing information on the wind farm project for inclusion in the brochure if requested by Na Ala Hele. In this way, the mitigation is defined, easy to understand and easy to confirm compliance. We therefore request that the condition language be changed to the following:

Proposed New Language: 4. *the applicant shall install the wind turbines to minimize visual impacts to the view planes along the Old Lahaina Pali Trail. The*

Mr. Samuel J. Lemmo, Administrator

May 23, 2005

Page 9 of 12

applicant shall ~~work with~~ contribute \$1,500 annually to the Na Ala Hele program to implement the mitigation measures they suggest on page 10 of the staff report for the printing of a trail brochure and will provide information about the project to Na Ala Hele for inclusion in the brochure if requested.

Thank you, once again, for your time and assistance ~~with~~ the administration of the above-referenced project.

Sincerely,



Mike Gresham
Vice President
for Kaheawa Wind Power, LLC

cc: Gary Martin, Land Agent, Land Division



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

JUN 24 2005

Ref. File No. CDUP MA-3103

Mr. Mike Gresham, Vice President
Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, HI 96768

Dear Mr. Gresham:

This is to inform you that on June 24, 2005 the Board of Land and Natural Resources modified your request to amend various conditions imposed under CDUP MA-3103. The approved amendments are provided below:

1. The applicant shall comply with all applicable statutes, ordinances, rules and regulations of the Federal, State, and County governments, and applicable parts of Section 13-5-42, Hawaii Administrative Rules;
2. The applicant shall comply with applicable Department of Health administrative rules;
3. All mitigative measures proposed in the final Environmental Impact Statement for the project shall be implemented;
4. The applicant shall install the wind turbines to minimize visual impacts to the view planes along the Old Lahaina Pali Trail. The applicant shall contribute \$1,500 annually to the Na Ala Hele program for interpretive and educational information;
5. The applicant shall conduct a follow-up archaeological survey if the course of the upper spur road is altered;
6. Heiau 5232 at Ukumehame will need to be preserved. A preservation plan (scope of work) will need to be submitted to the State Historic Preservation Division for review and acceptance. This plan will need to identify buffers around the site, interim protection measures, and long-term preservation measures. The Division will also need to verify that the plan has been successfully carried out, prior to land alteration, or alternatively construction activities may commence following written verification from our Division that the interim preservation measures are in place. Also, as a protective measure, orange construction fencing shall be placed along both sides of the existing access road where it

EXHIBIT

3

intersects with the Lahaina Pali Trail (State Site 50-50-09-2946 and 50-50-09-2950). The State Historic Preservation Division (Dr. Melissa Kirkendall, 243-5169) will need to verify that the protective construction fencing is in place, prior to any land alterations;

7. If evidence of historic sites or subsurface features, including burials, are discovered during construction, all activity in the vicinity of the find shall cease and the applicant shall contact the State Historic Preservation Division at 692-8015;
8. All activities connected with the project shall be contained within the project area as identified in the application for a CDUP and the final EIS;
9. The applicant shall take appropriate measures to mitigate the impacts of erosion and siltation, and prevent oil, fuel, or cement products from falling, blowing, or flowing on Conservation lands and ocean waters. All ground work will be scheduled during periods of low rainfall. The applicant shall submit the National Pollution Discharge Elimination System (NPDES) permit to the OCCL to satisfy this condition;
10. Prior to construction, the Applicant shall submit a Wild Land Fire Contingency Plan approved by the Division of Forestry and Wildlife for all phases of the project. The plan shall be completed in accordance with the suggestions on page 9 of this staff report. All personnel of Hawaii Wind Energy, LLC and the contractor involved with this project shall comply with the provisions of the Fire Contingency Plan. A copy of the plan shall be filed with the Land Division. The applicant will be liable for all fires determined by DLNR to have been caused or started from management activities related to the project. Also, DOFAW may inspect the site at any time upon request;
11. All construction materials shall be removed from the project site and disposed of at a government authorized landfill site. Additionally, the applicant shall remove any trash or debris from the site upon completion of the project;
12. The applicant shall obtain the appropriate authorization through the Maui District Land Office, Department of Land and Natural Resources, for the use of State lands;
13. The preliminary construction plans, including improvements to the access road network and locations of the site operations and maintenance building and site substation shall be coordinated with the Office of Conservation and Coastal Lands, Maui District Land Agent, the Historic Preservation Division, and the Division of Forestry and Wildlife;
14. The applicant shall provide four (4) sets of the final construction plans and specifications to the Chairperson or his authorized agent for approval with the permit declarations set forth in the permit application and the final EIS. Three (3) sets of plans will be returned to the applicant. Plan approval by the Chairperson does not infer approval required by other agencies;
15. Any work to be done on the land shall be initiated within two (2) years of the approval of the use by the Board, and all work and construction must be completed within four (4) years of the approval by the Board;

16. The applicant shall notify the Department in writing when construction is initiated and when construction is completed;
17. If any information or data provided by the Applicant prove to be false, incomplete or inaccurate, this permit may be modified, suspended, or revoked. The Department may, in addition, institute appropriate legal proceedings;
18. Where any polluted run-off, interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the polluted run-off, interference, nuisance, harm, or hazard;
19. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
20. All cleared areas shall be revegetated in a manner consistent with other permit conditions, with specific consideration given to the fire contingency plan and the Habitat Conservation Plan. Any necessary revegetation shall be completed within thirty days of the completion of specific project components that resulted in ground clearing, using native species found in the area;
21. During construction and the initial operational period of the windfarm, the applicant, in consultation with DLNR, Division of Forestry and Wildlife staff, shall monitor wildlife to ensure that the wind turbines and their towers are not sources of mortality to endangered birds, such as the Nene, the Dark-rumped Petrels, or to the endangered Hawaiian hoary bat. The type and frequency of monitoring periods shall be coordinated with the Division of Forestry and Wildlife, Department of Land and Natural Resources. The applicant shall make arrangements with the DLNR, Division of Forestry and Wildlife to pay for the cost incurred by all monitoring;
22. The applicant shall implement their Downed Bird Protocol and shall be required to immediately notify the USFWS and DOFAW if any injured or dead birds or bats are found, and the location of possible strikes. The applicant shall pay for the cost incurred by this effort;
23. The applicant shall continue opportunistic surveys of bird. Specific sightings shall be documented via a standard bird observation form;
24. The applicant shall inspect, in coordination with the DLNR, Division of Forestry and Wildlife, turbine sites to insure that no bird nests are present in the immediate area of the proposed tower foundation and access road;
25. The applicant shall work closely with DLNR, Division of Forestry and Wildlife staff to manage the wildlife habitat. This will include periodic removal of rubbish. If necessary, this will include trapping to control the number of unwanted mammals, e.g., rats, mongoose,

feral cats and dogs. The applicant shall implement additional mitigation measures to protect native habitat as suggested on page 11 of this staff report;

26. The applicant shall develop an education and observation program, including a bird identification primer and format for documenting specific observation;
27. If for any reason, the project is terminated or GE Wind Energy enters bankruptcy proceedings, the responsibility for the removal of all facilities and equipment associated with the project shall remain with GE Wind Energy, and the area is to be restored to the satisfaction of the Department of Land and Natural Resources;
28. The Applicant shall allow State and/or Federal biologists access to the site to perform periodic checks for bird and mammal mortalities;
29. Prior to construction, all access road and site construction plans shall be reviewed and approved by the County of Maui Department of Public Works and the Department of Transportation, Highways Division, if applicable;
30. The applicant shall minimize ground disturbance to reduce the potential for soil erosion in and around the gulches;
31. The applicant shall add, and replace as necessary culverts to handle anticipated water flows in the gulches;
32. The applicant shall add channels or troughs along sections of the access road network to divert water flows and prevent soil erosion;
33. The applicant shall use gravel or other porous materials to maintain the integrity of the roadbed;
34. The applicant shall do additional botanical surveys as represented in the accepted EIS for the project;
35. The applicant shall hire a plant expert to supervise the actual construction work in areas in or near where there are native plants;
36. The applicant shall establish an inspection station at the staging area near the main highway to reduce the possibility of introducing alien plant species to the site, prior to the initiation of project work. Each vehicle will be inspected prior to traveling the jeep road up to the site;
37. The applicant shall ensure that operations and maintenance staff do not damage native plants. If construction or operation required the removal of native plants, the plants will be removed, relocated and replanted. The applicant shall pay for the cost of this effort;
38. The applicant shall work with plant experts to introduce appropriate native plant species back into the Kaheawa Pastures;

39. The applicant shall work with the County of Maui Planning Department to ensure that the appropriate colors tones are used on the towers and blades;
40. That this approval provides for the subdivision of Conservation District lands, if necessary, to accommodate the windfarm and access road;
41. The applicant will implement the conditions of the draft Habitat Conservation Plan (HCP) approved on June 24, 2005, by the Board of Land and Natural Resources. At the time the applicant obtains an HCP and receives an Incidental Take Permit from the U.S. Fish and Wildlife Service and a temporary license to allow take under Hawaii Revised Statutes § 195D-4, this condition shall be satisfied, which will supercede the draft HCP;
42. The applicant shall submit a pre-final construction plan for the wind turbines as well as hire a color consultant to develop the most appropriate color scheme for the project to blend in with the surroundings. The color scheme shall be reviewed by the County of Maui for consistency with its programs and policies;
43. That failure to comply with any of these conditions shall render this Conservation District Use Permit null and void; and
44. All other terms and conditions as prescribed by the Chairperson.

Please acknowledge receipt of this letter, with the above noted conditions, in the space provided below. Please sign two copies, retain one, and return the other within thirty (30) days of the date of this letter.

Should you have any questions on any of these matters, please feel free to contact me at 587-0381.

Aloha,


Samuel J. Lemmo, Administrator

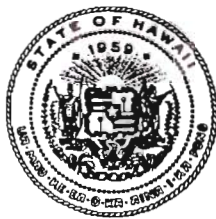
Receipt acknowledged

Signature

Date

c: Chairman's Office
Maui Board Member
Maui Land Agent
County of Maui Planning Department
DOFAW
DOCARE
HPD
USFWS

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:TM

REF: CDUP MA-3103

NOTICE & ORDER

Mr. Mike Gresham, Vice President
Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, HI 96768

SEP 27 2005

Dear Mr. Gresham:

SUBJECT: Cease and Desist Construction of the Access Road Located at the Kaheawa Pastures
Wind Energy Generation Facility Located at Ukumehame, Island of Maui, TMK:(2)
3-6-001:014

Based upon site inspections conducted on September 23 & 26, 2005 by the Department and photographic evidence, the Department of Land and Natural Resources is issuing a NOTICE & ORDER to cease any further access road construction on State unencumbered public lands within the Conservation District, General and Limited subzone until mitigative and Best Management Practices are in place to protect the resources and the general public from polluted run-off, interference, nuisance or harm. Please implement mitigative measures immediately to reduce the potential for run-off, rockfall, and erosion.

YOU ARE HEREBY ORDERED TO CEASE any further improvements on the access road. Should you fail to cease immediately, you will be subject to fines up to \$2,000 per day pursuant to Chapter 13-5, HAR and \$500 per day pursuant to Chapter 13-221, HAR in addition to administrative costs incurred by the Department.

Please contact Sam Lemmo of our Office of Conservation and Coastal Lands at (808) 587-0381 to clear this matter.

By:

PETER T. YOUNG, Chairperson
Department of Land and Natural Resources

c: DOCARE MAUI
MDLO
OCCL
Chairperson

EXHIBIT 4

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

OCT - 5 2005

October 5, 2005
File No.: MA-3103

Mr. Mike Gresham, Vice President
Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, HI 96768

Dear Mr. Gresham:

SUBJECT: Follow-Up Letter to September 27, 2005 Notice and Order to Cease and Desist Work on Road Construction for the Kaheawa Pastures Wind Energy Generation Facility Located at Ukumehame, Island of Maui; Tax Map Key: (2) 3-6-001:014

On September 27, 2005, the Department of Land and Natural Resources (DLNR) issued you an Order to cease further work on the access road to Kaheawa Pastures. The Order further instructed you to implement mitigative measures to reduce potential run-off, rock fall, and erosion stemming from construction of the access road and staging area.

DLNR-Maui staff had visited the site on September 23 & 26 and recommended issuance of a stop order immediately. A major concern was the possibility of massive erosion due to an impending rainstorm caused by former Hurricane Kenneth or any other rain event. The order also included language requiring the permittee to implement Best Management Practices (BMPs) to reduce the potential for run-off, rock fall and erosion.

You stopped all work on the access road, but are continuing to work on the staging area to install two 80-foot culverts to control potential storm flows. In addition to this work, you have been implementing additional BMPs in the staging area and along the access road, including hydro mulching, berming of the road shoulder, silt fences, water truck spray, and placement of gravel near the highway to help filter any sediment as a result of rainfall.

OCCL staff inspected these areas on October 3, 2005 to ensure that the project was being implemented in conformance with the approved CDUP and construction plans. The inspection yielded two (2) outstanding issues. The constructions plans for the access road provide for a 12-foot wide road, with some 16-foot sections. In one area inspected by OCCL staff, the road width approached 30-foot wide.

OCCL staff inspected another section of the road where borrow material (i.e., rock and earth material that was removed from a 30-foot high road cut) was pushed over the side of the road, into a dry gulch. The material covered much of the slope of the gulch for approximately 70-100 feet to

EXHIBIT 5

the bottom. The bottom of the gulch was strewn with large boulders that were dislodged as part of the excavation.

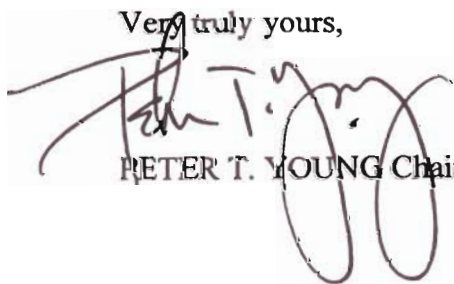
Because of these issues, we believe that the permittee is not compliant with the CDUP and the approved construction plans. In order to become compliant, you will need to conform with the approved plans by building the road in accordance with the plans or seek a revision to the approved construction plans to reflect the "as built" project (up to this point in time,) as well as the "to be built" project for the remainder of the access road.

The approved plans show a 12-16 foot wide road surface and cut and fill slopes. The revised plans need to provide details of the actual sub grade work and other road or drainage features, including cut and fill. If you choose to remediate the improved road to comport to the approved plans, you will need to reduce the sub grade road to reflect the approved plans. If you choose to seek a plan change, the Department will review these plans for consistency with the permit and will determine if the plan change can be accommodated within the existing approval.

In the event that plan modifications are approved or the existing road is remediated, the permittee shall cease and desist from pushing borrow material into areas not covered by the CDUP. Continuance of this practice could result in revocation of the permit. The material that was already pushed into the lower gulch shall be revegetated with grass species acceptable to the Department. The Department is currently considering appropriate penalties for these permit transgressions.

Please let us know if you intend to construct according to the approved plans or intend to revise your construction plans for our review and approval. Please let us know which process you intend to follow as soon as possible so the Department can provide you with a timely response.

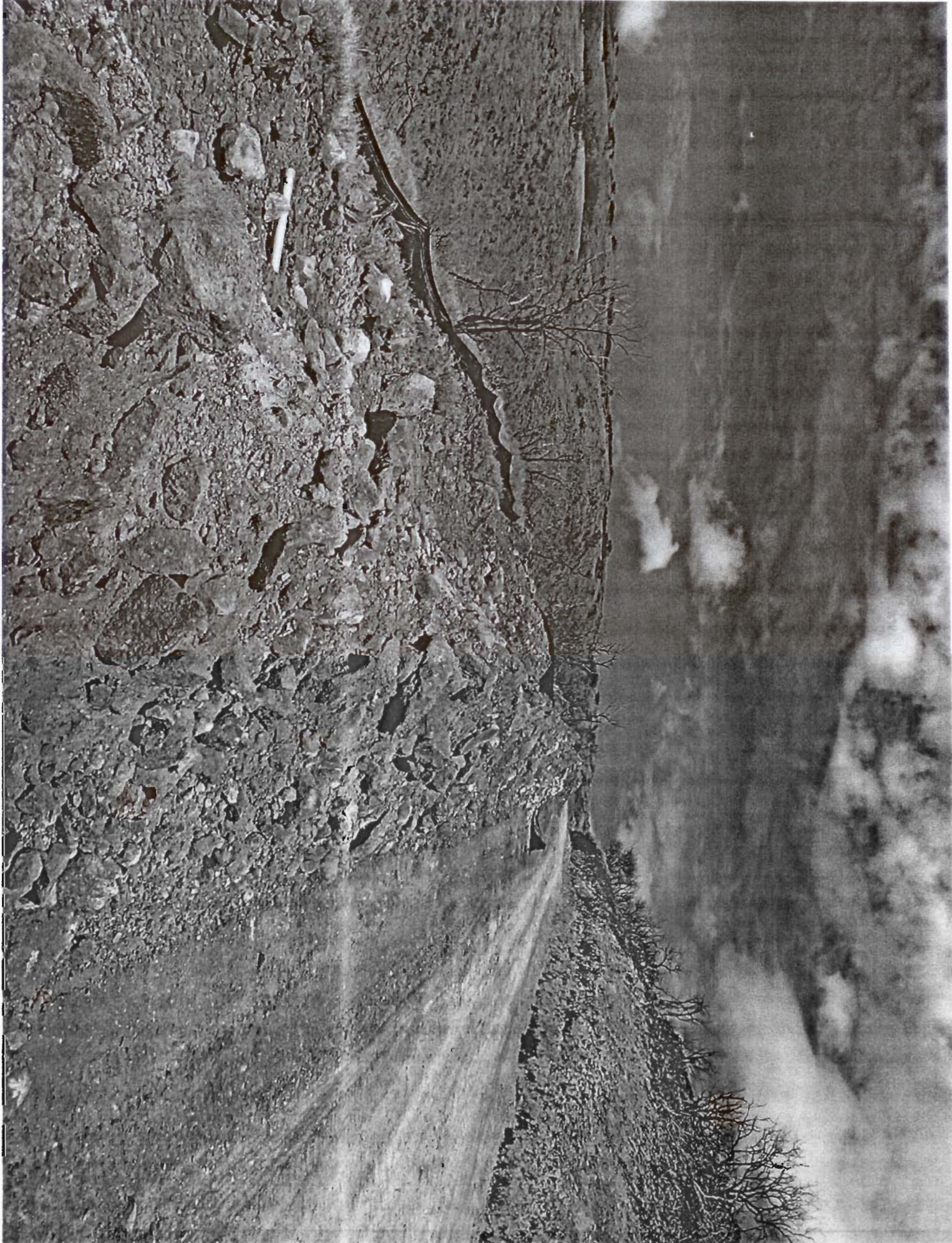
Very truly yours,

A handwritten signature in dark ink, appearing to read "Peter T. Young", is written over the typed name. The signature is fluid and cursive.

PETER T. YOUNG Chairperson

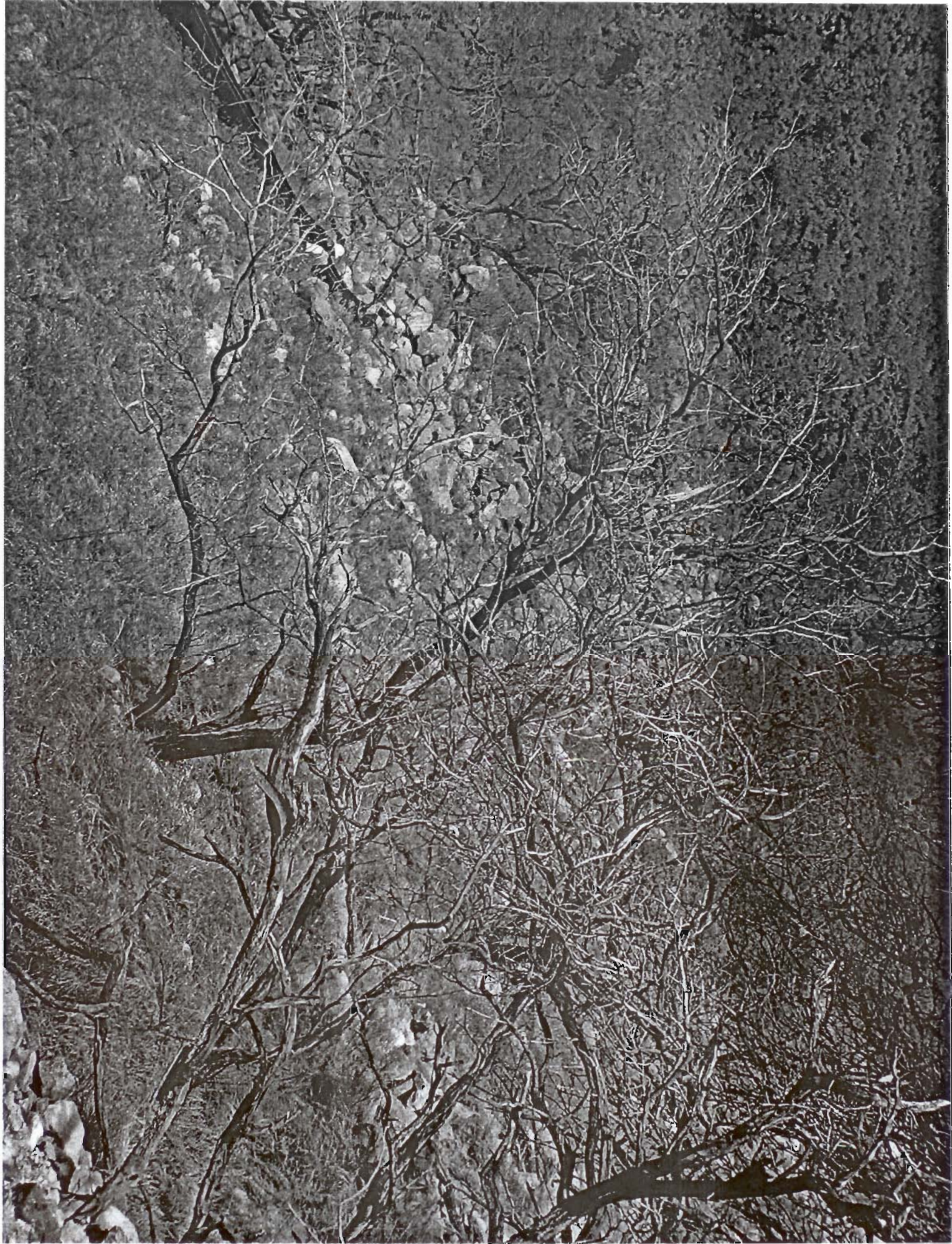
cc: Maui Board Member
MDLO
DOCARE (Maui)
Maui Planning Department
Department of Health, Clean Water Branch











LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

OCT - 7 2005

File No.: MA-3103

Mr. Mike Gresham, Vice President
Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, HI 96768

Dear Mr. Gresham:

SUBJECT: Response to October 7, 2005 Letter Regarding Remediation Proposal Related to Wind Farm Access Road Construction Located at Ukumehame, Island of Maui;
Tax Map Key: (2) 3-6-001:014

Thank you for your October 7, 2005 letter regarding proposed remediation work on the Kaheawa wind farm access road, and your commitment to comply with the approved project construction plans. According to your letter, you are seeking clearance from the Department of Land and Natural Resources (DLNR) to initiate work immediately on the access road. You would like to continue work on the road and remediate the questionable areas simultaneously. You propose to post a bond in favor of the DLNR for \$200,000 as a security to ensure the completion of the remediation work. You propose pre-construction consultation each week with DLNR. You are also willing to pay a reasonable fee to a third party for these services upon review of required scope from the DLNR.

The Department agrees to these measures and you may recommence construction and remediation under the following conditions:

1. The bond for \$200,000 shall be returned when the remediation of the affected area is completed. Failure to remediate the area to the satisfaction of the DLNR shall result in the forfeiture of the bond;
2. The permittee shall work directly with Mr. Curtis Powers of the DLNR, Engineering Division on the remediation work, as well as on the remainder of the project construction. Mr. Powers shall have unfettered access to the site and will conduct no less than three site inspections each week to ensure that the permittee is in compliance with all plans;
3. The permittee shall provide Mr. Powers with a copy of the construction plans for the access road, and other relevant documents, immediately. The permittee shall hold a pre-

EXHIBIT

6

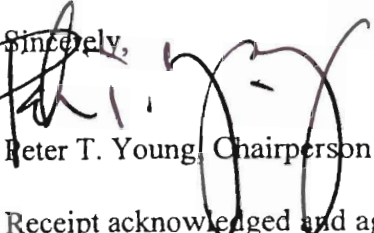
construction management meeting with Mr. Powers prior to the initiation of any work on the premises, and once every week thereafter. During these weekly meetings future and past construction activities are to be evaluated and discussed to ensure that work is consistent with all plans;

4. The permittee shall construct the improvements under the specifications and representations of the approved plan.
5. The permittee shall stop all work on the premises if it is determined that project construction work does not comply with the permit conditions, approved remediation and/or construction plans;
6. No work shall begin until the permittee has met with Mr. Powers and both parties have reached agreement over project supervision activities consistent with this approval;
7. The permittee offered to pay for third party inspections, as well. We reserve the right to entertain this offer in the future.

The DLNR shall process a violation case for the unauthorized fill that was pushed over the slope and into the gulch. This matter shall be forwarded to the Board of Land and Natural Resources for disposition which could include fines, restoration and administrative costs;

Please acknowledge receipt of this letter, with the above noted conditions, in the space provided below. Please sign two copies, retain one, and return the other within thirty (30) days.

Sincerely,


Peter T. Young, Chairperson

Receipt acknowledged and agreement to the above conditions

Signature

Date

Attachment

cc: Maui Board Member
Maui Land Agent
Engineering (Maui)/HPD
County of Maui Planning Department
DOH



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING

FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

NOV 30 2005

File No.: MA-3103

Mr. Mike Gresham, Vice President
Kaheawa Wind Power, LLC
1043 Makawao Street, Suite 208
Makawao, HI 96768

Dear Mr. Gresham:

SUBJECT: Response to November 9th Letter Regarding Access Road Remediation in Compliance with the Department's October 7, 2005 Letter, Ukumehame, Island of Maui; Tax Map Key: (2) 3-6-001:014

Thank you for your November 9, 2005 letter requesting our approval of the remediation plan.

Remediation Plan

Having spoken with Mr. Powers and having reviewed the subject plan internally, the Department hereby approves the remediation plan. Please proceed with the remediation work. Please coordinate this effort with Mr. Powers to the greatest extent possible. When the work has been completed, please provide this office with an after-action report complete with photographs so we may evaluate the adequacy of the remediation work.

In addition, we have tentatively scheduled an action before the Board of Land and Natural Resources (BLNR), on January 13, 2006 to take up the matter of an alleged violation referenced in our October 7, 2005 letter. In addition to the alleged violation, we will consider a modification to permit conditions regarding the use on non-native plants for slope stabilization on an interim basis.

Please acknowledge receipt of this letter, with the above noted conditions, in the space provided below. Please sign two copies, retain one, and return the other within thirty (30) days.

EXHIBIT

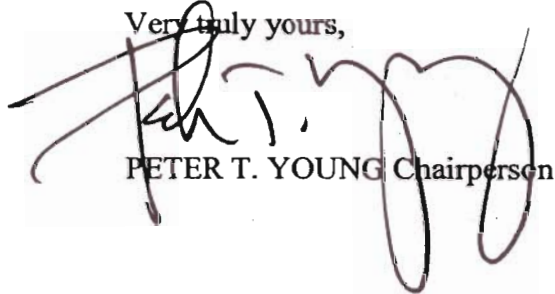
7

Receipt acknowledged

Signature

Date

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Peter T. Young', is written over a light gray rectangular background. The signature is fluid and cursive, with a large loop at the end.

PETER T. YOUNG Chairperson

Attachment

cc: Maui Board Member
Maui Land Agent
Maui (DOFAW)
Engineering (Maui)/HPD
County of Maui Planning Department
DOH

EXCESS CUT MATERIAL REMOVAL ESTIMATE

EQUIPMENT:

1. ARTICULATED F.E. LOADER

± 30 HRS @ \$60. PER = 1800

2. EXCAVATOR (225 CAT)

42 HRS @ \$70 PER 2940

3. ROCK TRUCK

28 HRS @ \$55.00 1540

4. BULLDOZER

4 HRS @ 250.00

5. WATER TRUCK

3 hrs @ 50.00 150.00

SUPERVISORY & ADMIN @ 25% \$6680
1670

\$8350
(REMEDIATION DONE AT LEE'S EXPENSE)

EXHIBIT 8